88-81

No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VICTORIA M. VOGE,

Petitioner,

v.

UNITED STATES,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

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QUESTIONS PRESENTED

1. Are significant military personnel actions such as the revocation of a medical officer's hospital credentials, or passovers for promotion, justiciable?

2. Where the monetary and nonmonetary aspects of a military personnel case arise from a common nucleus of operative fact, may the Claims Court refuse to "provide an entire remedy and complete the relief afforded" by the money judgment, as provided in the Tucker Act?

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

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Victoria M. Voge respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Federal Circuit entered in her case on April 19, 1988.

Opinions Below

The decision of the United States Claims Court is reported at 11 Cl. Ct. 510 (1987) and reproduced in the appendix to this petition ("Pet. App.") at page 21a. An order denying reconsideration appears at Pet. App. 17a. The United States Court of Appeals for the Federal Circuit decided the case on April 19, 1988, in an opinion published at 844 F.2d 776 and reproduced at Pet. App. 5a. A timely petition for rehearing and suggestion for rehearing *in banc* was filed. Rehearing was denied on May 26, 1988, and the suggestion for rehearing *in banc* was declined on June 9, 1988. Pet. App. 1a, 3a.

Jurisdiction

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1) (1982). Rehearing having been denied on May 26, 1988, the petition is timely filed under 28 U.S.C. § 2101(c) (Supp. IV 1986) and Rule 20.4.

Statutory and Regulatory Provisions

The Tucker Act provides, in pertinent part:

> (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon . . . any Act of Congress or any regulation of an executive department . . . .
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records, and such orders may be issued to any appropriate official of the United States. . . . 28 U.S.C. § 1491(a) (1982).

The Uniformed Services Health Professionals Special Pay Act of 1980, as amended, provides, in pertinent part:

> (a)(4)(B) Subject to subsection (c) of this section, an officer entitled to variable special pay under paragraph (2) . . . of this subsection who has ten or more years of creditable service is entitled to additional special pay of $10,000 for any twelve-month period during which the officer is not undergoing medical internship or initial residency training.
>
> (2) Under regulations prescribed by the Secretary of Defense . . . , the Secretary of the military

> department concerned may terminate at any time an officer's entitlement to the special pay authorized by subsection (a)(4) . . . of this section. If such entitlement is terminated, the officer concerned is entitled to be paid such special pay only for the part of the period of active duty that he served, and he may be required to refund any amount in excess of that entitlement. 37 U.S.C. § 302 (Supp. IV 1986).

Navy regulations governing special pay for Medical Corps officers provide:

> 7. The [Surgeon General of the Navy], under the Chief of Naval Operations, may deny or terminate [ASP] . . . under the following guidelines:
>
> a. Commanding officers may recommend to the [Surgeon General of the Navy] that an officer's entitlement to [ASP] be denied or terminated based upon an inadequate performance level supported in that officer's periodic or special fitness reports . . . .
>
> b. A review board shall review the commanding officer's performance as reflected in the fitness reports, the commanding officer's letter of recommendation and the officer's rebuttal, if any . . . .
>
> c. The [Surgeon General of the Navy] may deny or terminate [ASP] by approving the recommendation of [a] review board that the recipient's professional performance is inadequate to justify continuing payment of special pay as evidenced by periodic or special officer fitness reports. . . . U.S. Navy, Secretarial Instruction 7220.75A (Apr. 23, 1982); *see also* U.S. Navy, Secretarial Instruction 7220.75B (Sept. 23, 1983) (requiring review board to review "fitness reports, supporting doc-

uments, commanding officer's letter, and the officer's rebuttal").

Paragraph 14-11 of Chapter 14 (Credentials Review Process) of Bureau of Medicine and Surgery Instruction 6320.62 (May 29, 1981) sets forth a "*Fair Hearing Plan*" for Navy health care professionals. The full text follows; pertinent portions appear in boldface.

> **The following actions are considered adverse: suspending, limiting, or revoking privileges previously granted by the same activity.**
>
> **a. Whenever adverse action is contemplated, the practitioner shall be afforded effective and timely notice of the right to the following procedural safeguards:**
>
> **(1) Written notice that adverse action is contemplated and the reasons therefor**
>
> **(2) A meaningful hearing before the credentials review committee at which time there must be an opportunity to be heard in person and present evidence**
>
> **(3) A reasonable opportunity to present evidence and the testimony of witnesses and to confront opposing witnesses**
>
> (4) If adverse action is recommended, a written decision stating the evidence relied on, the reasons for the recommendation, and the right to appear before the commanding officer before final action is taken (see paragraph 14-11i)
>
> (5) Availability of qualified and independent assistants [*sic*] in preparing the case

The foregoing enumeration of procedural rights to be afforded a practitioner is intended as gen-

eral guidance for all adverse actions contemplated during the credentials review process. The practices of each command shall be adapted to provide for each of these rights.

b. Except as provided in paragraph 11j, a practitioner shall be given at least 10 days following his/her receipt of notice of the foregoing rights to file a written request for a hearing. Any such request shall be delivered to the commanding officer in person or by certified or registered mail. A practitioner who fails to request a hearing within the time and in the manner specified, waives any right to such hearing and to any review of the matter to which he/she might otherwise be entitled. In such an event, the credentials review committee shall proceed to file such findings and report to the commanding officer as it deems appropriate under the circumstances.

c. Except as provided in paragraph 11j, a hearing shall be held not less than 15 nor more than 30 days from the date of the receipt for the hearing request. At least 7 days prior to the hearing, the commanding officer shall send the practitioner notice of the time, place, and date of the hearing.

d. The commanding officer shall ensure, to the extent practicable, that members of the credentials review committee hearing a particular case can be objective and independent in their deliberations. Any member with prior involvement in the matter being considered should normally be excused from taking part.

e. A hearing need not be conducted strictly according to the rule of law relating to the examination of witnesses or presentation of evidence. Any relevant matter upon which re-

sponsible persons customarily rely in the conduct of serious affairs (including, but not limited to, the standards of professional practice as established by relevant professional literature) shall be admitted or accepted as a matter of official notice regardless of the admissibility of such evidence in a court of law. Each party shall be entitled to submit memoranda concerning any issue, and such memoranda shall become a part of the hearing record. The chairman of the credentials review committee may, but shall not be required to, order that oral evidence be taken only on oath or affirmation. If official notice is taken of any fact or scientific matter, the parties shall be so informed and those matters shall be noted in the hearing record.

f. The right to assistance in preparing the case does not imply an absolute right to the assistance of a representative at the hearing itself. Attorneys and other professionals who desire to represent a practitioner before the credentials review committee shall request permission to do so in writing prior to the commencement of the hearing. Permission may be granted by [*sic*] the sole discretion of the committee and, if so granted, may be withdrawn at any time if the presence of the representative impedes the committee in performing its assigned duties.

g. A record of the hearing shall be kept that is of sufficient accuracy to ensure that an informed and valid judgment can be made by any group that may later be called upon to review the record and render a recommendation or decision in the matter. The credentials review committee may select any reasonable method to be used for making the record (e.g., court reporter, electronic recording unit, detailed transcription, or minutes

of the proceedings). A practitioner who desires a method other than the one chosen by the committee may request same, but if the request is granted, the practitioner shall pay any added expense occasioned by the alternate method.

h. Requests for postponement of a hearing shall be granted by the credentials review committee only upon a showing of good cause and with the concurrence of the commanding officer. For the convenience of the participants or for the purpose of obtaining new or additional evidence or consultation, the committee may recess the hearing and reconvene without additional notice. Upon conclusion of the presentation of evidence the hearing shall be closed, and the committee shall thereafter conduct its deliberations. Upon the conclusion of deliberations, the hearing shall be declared finally adjourned.

i. Within 15 days after final adjournment of the hearing, the committee shall make a written report of its findings and recommendations and shall forward same, together with the hearing record and all other documentation considered by it, via the director of clinical services to the commanding officer for final action. If the report recommends adverse action, a copy of the report shall be provided to the practitioner coincident with its forwarding to the commanding officer. The practitioner shall have 5 working days following receipt of the report to file a request to appear at Mast [traditional Navy procedure for a commander to meet with persons subject to his command for disciplinary, commendatory or other reasons] to discuss the report with the commanding officer. Failure to request Mast within the time allowed shall constitute a waiver of any further review of the matter and acquiescence in

any final action the commanding officer takes thereafter.

j. Notwithstanding any of the foregoing, a commanding officer is authorized to take summary action to suspend or limit the credentials of a practitioner when in his/her judgment the best interests of the patients so required and a delay in taking action might jeopardize the life or health of a patient. In such event the commanding officer may issue any suspension or limitation order necessary under the circumstances, but in no event shall the suspension or limitation exceed a period of 30 days. The credentials review committee shall hold a hearing in all cases of summary action, even though a practitioner may not have requested one. The suspension or limitation order itself shall be considered sufficient notice to the practitioner, and the 7-day period referred to in paragraph 14-11c shall be shortened to 3 days. The hearing shall be held and the committee's report written in sufficient time for the latter to reach the commanding officer prior to the end of the suspension or limitation period. (This requirement may be waived by the commanding officer, but the suspension or limitation cannot exceed 30 days in any event.) The right to request Mast after receipt of the committee's report is not affected by summary action.

k. Final action on the recommendation of the credentials review committee is the sole responsibility of the commanding officer and shall be based only on the report of the committee. The commanding officer may not take action more severe than that recommended by the committee, but may take any lesser action deemed appropriate. Final action shall be documented in writing and delivered to the practitioner.

1. A credentials review committee report and commanding officer's final action that are rightfully accomplished in accordance with this chapter are not subject to withdrawal, alteration, or change except by special authorization by the Secretary of the Navy (through the Board for Correction of Naval Records).

Statement of the Case

A

Dr. Victoria Voge, a career Navy physician who remains on active duty, brought this action: (1) to recover $30,000 in Additional Special Pay ("ASP") under 37 U.S.C. § 302 (1982), and (2) to correct related naval records including (a) those reflecting the withdrawal of her hospital credentials, (b) adverse fitness reports, (c) a passover for promotion to Captain, and (d) records of psychiatric evaluation undertaken for retaliatory and improper purposes. All aspects of the case arose out of the same events and are otherwise interconnected. The denial of ASP was expressly predicated on the withdrawal of Dr. Voge's credentials and an adverse fitness report, J.A. 80,[1] which in turn also referred to the withdrawal of credentials.

The decredentialing lies at the root of the problem, and was effected in violation of applicable regulations by a committee that included officers who had prejudged the case and held key meetings without notice to Dr. Voge or opportunity for her to participate. J.A. 36, 55-56. By the time she was permitted to participate, it was already too late because the case against her had gained unstoppable momentum. The committee procedure was a sham for a preordained command determination. Because the decredentialing was defective, all of its administrative sequelae were equally defective.

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[1] Citations to "J.A." refer to the Joint Appendix in the Court of Appeals.

B

From 1978 to 1981 Dr. Voge was assigned to the Naval Safety Center in Norfolk, where her duties required her to take professional positions that were highly critical of the Naval Medical Command (formerly known as the Bureau of Medicine and Surgery) and the Surgeon General of the Navy. J.A. 40, 44, 90, 100, 116. Evidently she developed a reputation for independence. That reputation appears to have preceded her to her next duty station. J.A. 40, 68.

In late 1981, Dr. Voge was transferred to the Naval Regional Medical Center on Guam and given additional responsibilities as command medical advisor and flight surgeon in charge of the branch clinic at the Naval Air Station. The medical center commander immediately adopted an unrelentingly hostile attitude toward her. As Judge Nettesheim observed from the bench, "what you have here is an unblemished record until she sets foot on Guam and then all hell breaks loose." Cl. Ct. Tr. 22. For example, she was summoned to the commanding officer's office and, on the basis of misinformation from third parties, was reprimanded for something over which she had no control. The commanding officer stated that he had "heard all about" Dr. Voge, and that she was considered a "troublemaker." She was ordered not to perform flight surgeon duties, but to limit herself to the duties of a general medical officer. J.A. 67.

Like civilian hospitals, Navy hospitals have a program for credentialing medical personnel. Newly-assigned physicians receive credentials for 90 days, after which a decision is made on permanent privileges. Dr. Voge was therefore given 90-day privileges. Loss of hospital credentials is a substantial blot on a physician's professional reputation and is likely to have an adverse effect on future employment opportunities.

In February 1982, the commanding officer told Dr. Voge that her professional competence was in question based on several clinical cases, but gave no details that would have permitted her to respond. He announced that he felt she had "serious problems," and caused her to be examined locally for a nonexistent psychiatric disorder. J.A. 40, 68, 105, as a result of which she was evaluated at a naval hospital on the mainland and found fit for duty. J.A. 47, 105. On February 26, 1982, the commanding officer informed Dr. Voge that she was on probation with the Professional Credentials and Standards Committee, but gave no reason for that action, and restored her to flight surgeon duties. J.A. 68.

Ultimately, Dr. Voge's credentials were revoked by the hospital commander based on the "recommendation" of the committee. J.A. 61. The procedures employed repeatedly violated the governing regulation. Thus, the committee met on March 9, 1982 without notice to Dr. Voge or opportunity for her to participate. J.A. 36. It neither requested nor examined her credentials from her prior duty station. An undated addendum to the minutes of the meeting summarily recorded that her initial 90-day privileges were being extended for another 90 days. J.A. 38. This violated the regulations, ¶ 14-7*b* of which provides: "Temporary privileges are limited to a 90 day period." J.A. 28.

On May 27, 1982, the committee met again. Once again it did not invite Dr. Voge. Nonetheless, it recommended to the hospital commander that adverse action be taken against her credentials. J.A. 55. This *ex parte* action violated ¶ *a* of the *Fair Hearing Plan*. By the time the second meeting occurred, the action against Dr. Voge had impermissibly gathered momentum without affording her the basic right to participate, thus unfairly skewing the decision against her and preventing the committee from conducting the mind of "meaningful hearing" and exercising the kind of "objective and independent judgment" required by ¶¶ *a*(2) and *d* of the *Fair Hearing Plan*.

After Dr. Voge was informed of the committee's recommendation, the commanding officer questioned her about how she would feel when the committee found her unfit, reminded her that he would soon be preparing her fitness report, and opined that there was something wrong with her. He visited her duty station and, in an astounding breach of military and professional practice, told personnel there that there was something medically wrong with Dr. Voge. J.A. 60, 68, 70. He furnished her with a copy of a proposed fitness report and informed her that it was both adverse and extremely detrimental to her career. He offered to rewrite it if she agreed to undergo two years of outpatient medical treatment. She refused. J.A. 100.

On June 15, 1982, the day before his own retirement, the commanding officer submitted the fitness report and minutes of the committee's May 27, 1982 meeting to superiors in Washington.

Two days later the committee met again. Five of the eight voting members in attendance had also been among the seven voting members at the May 27 meeting. Two senior medical officers who ostensibly recused themselves for cause owing to their prior participation in the matter nonetheless remained in the room and participated in the discussion without formally voting. J.A. 55-56. This violated ¶ *d* of the *Fair Hearing Plan*.

At long last, Dr. Voge was invited and permitted to bring counsel, but by then the die was cast. The minutes suggest that her input was given little attention or credence. In almost every instance, the committee's summary of her explanation was confined to irrelevant statements taken out of context. The overwhelming thrust of the minutes was to demonstrate why each of her assertions failed to support her position. Not surprisingly, given the momentum the matter had already achieved, the committee recommended revocation of clinical privileges and, "if

agreeable to both C[ommander] V[oge] and the Navy Medical Department," additional training. J.A. 64.

Two weeks later, when the minutes were finalized, Dr. Voge was permitted to meet with the new commanding officer to discuss the matter. J.A. 71. She submitted a formal rebuttal to all of the allegations, and fully explained her actions. J.A. 65. He was obviously unimpressed, since he notified her the same day that he was implementing the committee's recommendations and reassigning her.

Unsure of how to proceed, the commanding officer sought guidance as to what to do with Dr. Voge. When Washington responded that she should be sent to the Naval Regional Medical Center at Pensacola for 16 weeks of additional training, he reconvened the committee, again without notice to Dr. Voge. The committee, pliant as ever, obliged with a recommendation that she have at least a year's training at one of the Navy's four major teaching centers. J.A. 72-73. Eventually, in 1983, Dr. Voge began 12 months of retraining with the Air Force before returning to service with the Navy in Texas. She is now stationed at the Navy Development Center in Warminster, Pennsylvania.

Revocation of Dr. Voge's credentials had serious side effects. It was reflected in several of her fitness reports, J.A. 101, 112, 114, led to the denial of ASP of $10,000 per year for three years, J.A. 88, 131, to which she would otherwise have been entitled under 37 U.S.C. § 302 (Supp. IV 1986), and resulted in her being passed over for promotion to the grade of Captain.

Navy regulations promulgated under 37 U.S.C. § 302(c)(2) (Supp. IV 1986) require that decisions to deny or terminate ASP rest on the recipient's fitness reports. *See* Secretarial Instruction 7220.75 *supra.*

C

Dr. Voge complained in accordance with Article 138 of the Uniform Code of Military Justice, 10 U.S.C. § 938 (1982), without success. J.A. 77, 82. She also invoked the military correction board process under 10 U.S.C. § 1552 (Supp. IV 1986), but the limited relief she received there left in her record references to the revocation of her credentials as well as her passover for promotion. Eventually she sued for money damages and the necessary related record corrections under the Tucker Act.

In the Claims Court, the Government conceded Dr. Voge's entitlement to the ASP on the narrow ground that the responsible authorities had considered records they were barred from considering in making the decision to deny the ASP. On summary judgment, a money judgment was entered for Dr. Voge for the ASP, but the rest of her case was dismissed. 11 Cl. Ct. 510 (1987), Pet. App. 21a. Holding the fitness reports reviewable in an action challenging the termination of ASP, Pet. App. 24a-28a, the court sustained them on the basis of the correction board's decision and because it would not "second guess the medical judgments of [Dr. Voge's] superiors." Pet. App. 33a. It also held that the underlying revocation of her credentials was not reviewable. Pet. App. 31a. A timely motion for reconsideration was denied. Pet. App. 17a.

D

On appeal to the Federal Circuit, the parties again agreed that Dr. Voge was entitled to ASP. Dr. Voge contended that the decision of the Claims Court should be reversed and the case remanded with instructions to determine the validity of the withdrawal of her credentials and to grant relief, if warranted, as to any and all naval records reasonably related to the events in controversy, including the fitness reports. In the alternative, she argued that if the Court of Appeals were to determine that the

Claims Court lacked jurisdiction to address those parts of the case, the dismissal of her complaint should be vacated or the decision modified and remanded with instructions to transfer to the District Court for the District of Columbia. In any event, Dr. Voge argued, the Claims Court's decision to sustain her passover should be reversed and remanded with instructions to set that action aside and grant the usual relief in such cases (*i.e.*, consideration by another selection board as if she had not previously failed of selection, with provision for back pay and retroactive date of rank in the event she were selected by that board for promotion).

The Court of Appeals affirmed the money judgment but held that Dr. Voge's record correction claims were outside the Claims Court's power because "there was no reason to consider them in deciding" her ASP claim. 844 F.2d 776, 781 (Fed. Cir. 1988), Pet. App. 13a. It further held that the record correction claims were nonjusticiable. Pet. App. 9a-12a.

After concluding, in Part I of the decision, that "the procedural regularity of the termination [of Dr. Voge's ASP] would have been fully reviewable in the Claims Court" if the United States had not conceded procedural error,[2] the court went on incorrectly, in Part II, to characterize "the heart of this dispute" as "whether the court may review the substantive merits of the decision to terminate ASP." Pet. App. 9a. Finding a lack of standards to guide the exercise of judicial power, it concluded that the decision to deny ASP is nonjusticiable, analogizing it to such cosmic policy questions as the training, equipping and control of a state's National Guard. *See Gilligan v. Morgan*, 413 U.S. 1, 10 (1973), *cited at* Pet. App. 11a. The court thus permitted the Government's narrow conces-

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[2] *See also* Pet. App. 12a & n.2 ("Claims Court had the authority to enter judgment for the amount of ASP that was concededly due because of procedural errors").

sion of procedural error as to the ASP to define the Claims Court's Tucker Act authority "to provide an entire remedy and complete the relief afforded" by the money judgment.

In a footnote, the court sought to distinguish cases involving the denial of all pay and allowances through allegedly wrongful discharges, on the one hand, and "relatively minor and routine military personnel actions, like the denial of ASP," on the other. Pet. App. 12a n.1. Another footnote commented that there was no constitutional violation in the decredentialing, composition of service records or termination of ASP, "sav[ing] for another day the difficult question of the court's power of review when a clear constitutional violation is established." Pet. App. 12a n.2.

In Part III, the Court of Appeals determined that the other relief sought could not be justified under § 1491(a)(2)'s grant of authority to "provide an entire remedy and to complete the relief afforded by the [money] judgment" by correcting applicable records. It reasoned that the fact that the ASP cause of action could be resolved without resort to antecedent records destroyed any nexus between the ASP and the records. Pet. App. 13a-14a. It further reasoned that since it was for the Navy to pass on the merits of the decision to deny ASP, for the Claims Court to decide whether there was error in the "preparation and content" of Dr. Voge's records would constitute an indirect means of doing what that court "is foreclosed from doing directly." Pet. App. 14a. The court added that the correction board's review of the entire case did not enlarge "the justiciability of its decision in the Claims Court." *Id.*

Finally, in Part IV, the Court of Appeals inexplicably dismissed as a request for an impermissible judicially-ordered promotion Dr. Voge's thoroughly conventional prayer for invalidation of her passover. Pet. App. 15a.

Reasons for Granting the Writ

This case raises important and troublesome questions concerning the reviewability of military records and the role of the United States Claims Court in that process. The decision below conflicts with *Chappell v. Wallace*, 462 U.S. 296 (1983), by denying military personnel the judicial forum they have long enjoyed for the vindication of their rights under the record correction and promotion statutes as well as pertinent service regulations that have the force of law.

Given the size and complexity of the military community (which today numbers over 2,000,000 active duty members), the unavailability of alternative remedies, *see Chappell*, and the need to assure military medical personnel (all of whom are volunteers) that their professional standing will be protected against arbitrary action, the issues presented have potentially far-reaching ramifications in an area charged with the public interest.

In particular, the case calls upon the Court to determine the power of the Claims Court to grant nonmonetary relief necessary to "provide an entire remedy and to complete the relief afforded by" a money judgment under the Tucker Act. 28 U.S.C. § 1491(a)(2) (1982). The decision below effectively and improperly insulates from judicial review a broad range of military personnel actions that might be characterized as "routine"—as well as many others—on the unfounded notion that they are nonjusticiable.[3]

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[3] We thought the Court of Appeals might have used the term loosely to refer to some other reason for denying relief under § 1491(a)(2), but its failure to clarify its intent in response to the rehearing petition, *see* Pet. App. 1a, 3a, compels an inference that it intended "justiciability" in the usual Article III sense.

By so ruling on the very nonmonetary aspects of Dr. Voge's case over which it held the Claims Court lacked jurisdiction, the court went beyond anything the Government had argued for, disregarded basic

So sweeping a curtailment of the access of military personnel to the courts for nonmonetary aspects of pay disputes that may well have greater long-term consequences than the pay issues themselves is irreconcilable with the promise of judicial relief held out in *Chappell*, and should not be permitted to enter Tucker Act jurisprudence without this Court's express approval. Additionally, the decision below compels litigants to bring separate actions to secure money damages (in the Claims Court) and related

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limits of the appellate process and effectively extinguished Dr. Voge's right to judicial review under other legislation. "A court lacks discretion to consider the merits of a case over which it is without jurisdiction. . . ." *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 379 (1981); *Mark Smith Const. Co. v. United States*, 10 Cl. Ct. 540, 541 (1986) ("Lack of subject matter jurisdiction is a matter in abatement and, when a court dismisses a case on that ground, it should not also adjudicate the merits of the case"). The justiciability ruling would likely be given preclusive effect in a district court, thus preventing Dr. Voge from seeking relief as to the nonmonetary aspects of the case under the general grant of federal question jurisdiction. What is more, the ruling improperly arrogates to the Claims Court (an Article I court) and the Federal Circuit the power to control access to other federal courts under statutes for which they have no responsibility. Plenary review is essential, therefore, not merely to afford Dr. Voge a judicial forum for viable nonmonetary claims, but to restore the proper balance between the Claims Court and Federal Circuit, on the one hand, and the district courts and regional courts of appeals, on the other.

Bifurcation of the monetary and nonmonetary aspects of this case would be artificial (because they arise from the same common nucleus of operative fact, *cf. United Mine Workers v. Gibbs*, 383 U.S. 715, 725 (1966)), wasteful (because the Claims Court has already reviewed the record) and, as we explain in Point II, plainly contrary to the purpose of § 1491(a)(2). Nonetheless, if the nonmonetary aspects really do lie beyond the reach of the Claims Court, the remedy should include a remand with instructions to determine whether they should be transferred. 28 U.S.C. § 1631 (1982). If, as the Claims Court has elsewhere correctly held, transfer of nonmonetary portions of a case is appropriate where monetary claims are barred by the statute of limitations, *Schmidt v. United States*, 3 Cl. Ct. 190, 194 (1983), then *a fortiori* transfer should be allowed where, as here, a plaintiff has *prevailed* on a monetary claim.

record corrections (in the district courts), notwithstanding Congress's stated intent, in the 1972 Tucker Act amendment, to render such two-track litigation unnecessary. Pub. L. No. 92-415, 86 Stat. 652; S. Rep. No. 92-1066, 92d Cong., 2d Sess. (1972), 1972 U.S. Code Cong. & Ad. News 3116, 3118 (noting that existing law required wrongfully discharged employee to bring additional action in district court to obtain reinstatement).

If the Tucker Act issue were confined to military pay litigation, that would be reason enough for a writ of certiorari to issue. Section 1491(a)(2), however, is not confined to military cases. As a result, the decision below is likely to have erroneous spillover effects in other Tucker Act litigation, thus furnishing a further reason for this Court to grant review.

Finally, the decision below reflects a misuse of power by a court of limited jurisdiction, effectively closing the doors of the district courts to matters which they should hear if the Claims Court will not. To the extent that the records the Court of Appeals found nonjusticiable were the stated basis for the denial of ASP, by definition they had a sufficient practical nexus to the ASP to subject them to review under § 1491(a)(2). If that court was correct in holding that the Claims Court lacked jurisdiction to review the preparation and content of Dr. Voge's records, its ruling on justiciability improperly encroached on federal question and declaratory judgment matters over which Congress has given the district courts and regional courts of appeals exclusive jurisdiction. Any aspect of the case that lies outside the authority of the Claims Court should have been transferred elsewhere.

I

THE COURT OF APPEALS' DECISION CONFLICTS WITH *CHAPPELL V. WALLACE*

In *Chappell*, this Court explained, in the course of refusing to allow servicemen to bring *Bivens* actions against

their superiors,[4] that they could nonetheless invoke the record correction process created by Congress, 10 U.S.C. § 1552 (Supp. IV 1986), and obtain judicial review if dissatisfied with the results. 462 U.S. at 303 (citing *Grieg v. United States*, 226 Ct. Cl. 258, 640 F.2d 1261 (1981), *cert. denied*, 455 U.S. 907 (1982), and *Sanders v. United States*, 219 Ct. Cl. 285, 594 F.2d 804 (1979)). While *Chappell* involved allegations of racial discrimination, neither *Grieg* nor *Sanders* involved such issues, and nothing in *Chappell* suggests that it should be so limited.

Moreover, nothing in *Chappell* suggests that the broad range of military personnel actions is immune either to the record correction process or, as the Court of Appeals has sweepingly held, to judicial review thereafter. Indeed, the petitioners in *Chappell* complained of such adverse personnel actions as duty assignments and performance evaluations, 461 U.S. at 297, each of which would certainly seem to be "routine" in an armed service.

The Court of Appeals got around these inconvenient facts by the simple expedient of ignoring *Chappell*.[5]

What happened to Dr. Voge was unquestionably actionable and justiciable. The denial of ASP is not among the "narrow band of matters" that turn on strategy or tactics so as to require peculiarly military technical expertise, and therefore are not reviewable as a matter of separation of powers. *See Curran v. Laird*, 420 F.2d 122 (D.C. Cir. 1969). Absent this constitutional concern, the justiciability

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[4] *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971).

[5] The Court of Appeals also saw no need even to mention *Henderson v. United States*, 175 Ct. Cl. 690, 701 (1966), *cert. denied*, 386 U.S. 1016 (1967), where the validity of military personnel actions underlying a money claim was (properly) examined. That the court displayed so cavalier an attitude toward circuit precedent is its problem, rather than this Court's, but its failure even to cite, much less distinguish, key precedents, does little to instill confidence in its efforts.

of military personnel record claims is governed by the Administrative Procedure Act ("APA"). *Sanders, supra*, at 812; 5 U.S.C. § 701(a) (1982).

Where, as here, no statute precludes review, justiciability turns on whether there is "law to apply." *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402, 410 (1971). That standard is met in this case, just as this Court unmistakably implied that the sailors' claims were justiciable in *Chappell*.

ASP is automatic unless an affirmative decision is made to deny it. The Government correctly conceded below that this distinguishes it from other types of special pay where the grant itself is discretionary. If judicial review was available because the ASP decisionmakers considered documents they were barred from considering, it is impossible to see why it would not also be available to determine whether the underlying documents themselves were arbitrary, capricious, unsupported by substantial evidence, or otherwise not in accordance with law (or, as here, applicable agency regulations). Contrary to the Court of Appeals' assertion that "there are no tests or standards for the court to apply in determining whether the decision to terminate ASP is correct," Pet. App. 10a, the Navy's ASP-termination regulations quoted above furnish a sufficient framework for meaningful judicial review; they state the applicable standard and describe the evidentiary basis that must be considered. If the statutory "feasible and prudent alternative" standard furnished "law to apply" in *Overton Park*, the Navy's ASP regulations surely pass muster.

The decredentialing that underlay both the fitness reports and the ASP termination was governed by the even more detailed procedural regulations set forth in the *Fair Hearing Plan*. Those regulations were violated in several material respects that deprived Dr. Voge of a fair admin-

istrative determination. These Navy regulations too satisfy the "law to apply" requirement.

Military passovers are regularly reviewed to determine whether promotion consideration was on "a fair and equitable basis." *Sanders, supra,* at 813. The test has also been stated as requiring that the records "be complete and not misleading." *Yee v. United States,* 512 F.2d 1383, 1387 n.7 (Ct. Cl. 1975). These formulae are well-accepted and provide "law to apply."[6]

Both the denial of ASP and the decredentialing, and indeed, Dr. Voge's entire military record, are reviewable by the Board for Correction of Naval Records for "error" or "injustice." 10 U.S.C. § 1552 (Supp. IV 1986). Paragraph *l* of the *Fair Hearing Plan* expressly indicates that the BCNR may review a decredentialing. Judicial review is then available to determine whether the Constitution or a statute or regulation has been violated, applicable procedure has been disregarded, or the decision is arbitrary, capricious, an abuse of discretion, or unsupported by substantial evidence. 5 U.S.C. § 706 (1982); *Chappell,* 462 U.S. at 303. Once again, there is "law to apply."

None of the cases cited by the Court of Appeals stand for the proposition that Tucker Act jurisdiction is un-

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[6] Part IV of the Court of Appeals' decision, dismissing Dr. Voge's attack on her passover as an impermissible action for a promotion, Pet. App. 15a, is mistaken both as a description of what she sought and as a statement of the law. Dr. Voge never asked the Claims Court for a promotion, since she can only be promoted by action of a selection board. However, she does have a right to have the Navy directed to remove an invalid passover so her future chances for selection are not prejudiced. A judgment voiding a passover is not the same as a judicially-ordered promotion. As this Court observed in *Chappell,* correction boards have authority to award back pay and retroactive promotions, and such decisions are subject to judicial review. 462 U.S. at 303. Expungement of invalid passovers is integral to the record-correction process, *e.g., Sanders, supra,* at 820 (ordering removal of passovers and opportunity for further consideration for selection), as "previous passovers may detrimentally affect promotion opportunities." *Id.* at 819.

available where military pay has been wrongly withheld. Indeed, the court's affirmance of the judgment for $30,000 is at war with its conclusion that ASP determinations are nonjusticiable. The court held that ASP denials may be reviewed for violation of procedural requirements, but not for agency abuses of discretion. Under the plain language of 5 U.S.C. § 706 (1982), this holding is untenable. APA review clearly extends to both types of error. *Id.* § 706(2)(A), (D).

In addition to the effect on Dr. Voge's access to the district court, *see* note 3 *supra*, the Court of Appeals' misunderstanding of justiciability, unless corrected, is likely to have mischievous effects in other military personnel litigation. Its assurance that it intends to distinguish between discharges that lead to a denial of all pay and allowances and "relatively minor and routine military personnel actions, like the denial of ASP," Pet. App. 12a n.1, provides no comfort. Loss of $30,000 is hardly a "minor" matter; many Tucker Act cases have involved far less.[7]

A physician's loss of credentials is likely to have far-reaching professional and pecuniary sequelae, much like disciplinary actions imposed by a court or bar on an attorney. Loss of hospital privileges is actionable. *E.g., Northeast Georgia Radiological Assoc. v. Tidwell*, 670 F.2d 507, 511-12 (5th Cir. 1982); *Shaw v. Hospital Authority of Cobb County*, 507 F.2d 625 (5th Cir. 1975). Similarly, military passovers have significant long-term active duty and retired pay implications, and have often driven Tucker Act litigation.

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[7] Non-Tucker Act cases involving much smaller amounts may readily be found in the *United States Reports*. *E.g., Ward v. City of Monroeville*, 409 U.S. 57 (1972) ($100 fine); *Thompson v. City of Louisville*, 362 U.S. 199 (1960) ($20 fine); *Fowler v. Rhode Island*, 345 U.S. 67 (1953) ($5 fine); *Yick Wo v. Hopkins*, 118 U.S. 356 (1886) ($10 or 10 days).

None of these are "minor" matters, and if the Court of Appeals had in mind a *de minimis* principle, *cf. Bowman v. United States*, 7 Cl. Ct. 302, 311 (1985), it picked a totally inappropriate vehicle in which to apply it. Whether one or another of the types of official action complained of by Dr. Voge is fairly characterized as "routine" (and it is impossible to relegate the revocation of a physician's credentials to that category), we know of no authority that immunizes "routine" official action from judicial review. Indeed, we trust the day will never come when lawless governmental action may be defended or insulated from judicial review on the theory that mere matters of "routine" are in issue.

Certainly nothing in *Chappell* suggests such a limitation. Neither of the cases cited by the Court, with apparent approval, 462 U.S. at 303, to illustrate the record-correction process and judicial review thereof can fairly be said to have involved anything other than "run of the mill" military personnel litigation.

Finally, the Court of Appeals misframed the issue by treating Dr. Voge's effort to obtain relief with respect to the documents relied on in the termination of her ASP as simply an invitation to choose between competing medical judgments. Deciding whether a fitness report was infected by bias and prejudice or whether the decredentialing reflected prejudgment or secret proceedings in violation of regulation requires no medical judgments to be reexamined.

But even if it did, that would not preclude judicial review.[8] Until this case, it was clear that fitness reports and other service records were reviewable not only for procedural regularity (*e.g.*, were they prepared by the proper

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[8] In addition, the Claims Court can remand to a correction board with instructions to have medically-trained personnel assigned to that board for a particular case. Cl. Ct. Tr. 32 (Nettesheim, J.).

person? did they cover the proper reporting period? was the subject afforded an opportunity to respond or, where applicable, the right to counsel?), but also for factual errors or substantive unfairness. *Chappell*'s promise of judicial review for "substantial evidence" indicates as much. 462 U.S. at 303.

If allowed to stand, therefore, the decision below would wrongly thwart judicial review of such substantive issues as whether records were infected by bias and prejudice or whether any factual determinations were supported by substantial evidence. The Claims Court (or, presumably, a district court whose jurisdiction was invoked under § 1331 or the Little Tucker Act, 28 U.S.C. § 1346(a) (1982)) could never (a) decide whether a physical disability evaluation board had entered the wrong diagnosis or fitness for duty finding, (b) invalidate a fitness report because the reporting officer was misinformed as to the reported-on officer's responsibilities, or (c) set aside, for lack of evidentiary support, a finding that an individual was, for example, gay or a security risk.[9]

Review in this Court is essential to untangle the knots in the Court of Appeals' analysis and redirect Tucker Act doctrine to the path contemplated in *Chappell*.

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[9] Since one would never know it from the Court of Appeals' decision, it should be stressed that the substance of military personnel determinations has been subject to judicial review in the past. *E.g., Guy v. United States*, 608 F.2d 867, 870 (Ct. Cl. 1979) (collecting cases, and recognizing that jurisdiction lay to test whether a fitness report was an objective and accurate portrayal of performance); *Jordan v. United States*, 205 Ct. Cl. 65, 72-73 (1974) (on the proofs) (fitness for duty determinations may be set aside if evidence as a whole is less than substantial); *Cole v. United States*, 171 Ct. Cl. 178, 195-96, 198 (1965) (on the proofs) (board of inquiry findings found unsupported by substantial evidence); *Scheunemeyer v. United States*, 4 Cl. Ct. 649, 650-51 (1984) (reviewing factual accuracy of fitness report).

II

THE COURT OF APPEALS' CONSTRUCTION OF § 1491(a)(2) DEFEATS THE CONGRESSIONAL PURPOSE OF NOT REQUIRING PARALLEL ACTIONS FOR MONETARY AND NONMONETARY RELIEF

Contrary to the Court of Appeals' decision, it makes no difference, for purposes of the availability of relief under § 1491(a)(2), which feature of a case occasions the money judgment. The court appears to have concluded—notwithstanding its theory that ASP denials are nonjusticiable—that although the ASP could be set aside because of *one* procedural defect, § 1491(a)(2) is inapplicable to documents related to *other* flaws (procedural or substantive) that infected the ASP denial. This analysis is fundamentally flawed.

The particular error that impelled the Government's concession and the judgment for $30,000 was that certain fitness reports were considered by those who denied the ASP in violation of a regulation that prescribed which records could be considered for that purpose. Pet. App. 26a. This error was not advanced by Dr. Voge, and the Government's voluntary disclosure of it can no more alter the scope of the case or the power to grant relief under § 1491(a)(2) than did the offset in *Craft v. United States*, 589 F.2d 1057, 1058-59 (Ct. Cl. 1978) (per curiam). The records relief sought here was clearly "incident of and collateral to" the claim *she* framed. The Government cannot, by a concession, undo that fact in order to oust a court of jurisdiction conferred by Congress and properly invoked by a plaintiff.[10]

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[10] *Cf. Talley v. United States*, 6 Cl. Ct. 807, 811 (1984) (plaintiff not allowed "to perform surgery" on claim to remove monetary prejudice to defendant"); *Jones v. United States*, 6 Cl. Ct. 531, 534-35 (1984) (denying leave to amend complaint to thwart laches defense).

The fact that the Government concedes part of a case does not relieve the trial court of the obligation to adjudicate other properly presented issues, any more than a confession of error bars an appellate court from examining the record for itself. *E.g., Sibron v. New York*, 392 U.S. 40, 58 (1968). It is therefore appropriate to consider what would have happened if the Government had not conceded the point it chose to admit here. The case would have been litigated on the basis of Dr. Voge's challenge to the denial of ASP, which would have entailed an examination of the documentary basis for that action, since the Navy's ASP regulation defines the record on which such a decision must rest. It would have proceeded like countless cases of personnel who are discharged and in which the Claims Court examines underlying records to which the money claim can fairly be traced.

If the Court of Appeals is correct, however, no plaintiff who succeeds in having a passover set aside and in being restored to active duty could hope to be promoted thereafter, since his or her record would continue to suffer from the very flaws that led to the passover in the first place. Congress cannot have intended this, and this Court's precedents do not so hold, yet such is the logical outcome of the Court of Appeals' decision.

Neither § 1491(a)(2) nor its legislative history support the Court of Appeals' interpretation, whether the focus is on review for procedural regularity or for substantive accuracy or fairness. A principal purpose of the 1972 Tucker Act amendment was to render it unnecessary for litigants—military or not—to obtain money relief in the (then) Court of Claims and all other relief in a district court. S. Rep. No. 92-1066, *supra*. The crabbed reading invented by the Court of Appeals conflicts with this objective, finds no support in the cases, and disregards the plain meaning of the statute. Indeed, at a time when one circuit after another has had to wrestle with the propriety of claim splitting by litigants, *see Vietnam Veterans of America v.*

Secretary of the Navy, 843 F.2d 528, 535 (D.C. Cir. 1988) (noting intercircuit conflicts), it is anomalous that the Federal Circuit refused jurisdiction over parts of a case that *were* properly joined as contemplated by Congress. Here, as in *Bowen v. Massachusetts*, No. 87-712 (U.S. June 29, 1988), slip op. at 31 & n.50, there should be no need to split the case into two parts. Had the court correctly construed § 1491(a)(2), instead of disavowing jurisdiction over the nonmonetary aspects, there would be no need even to consider bifurcation and transfer. *See* note 3 *supra*.

While a nexus must exist between the money judgment claim that triggers Tucker Act jurisdiction and the related relief sought under § 1491(a)(2), that requirement is amply met by the facts of this case. The ASP termination rested *expressly* on Dr. Voge's decredentialing and fitness reports that referred back to the decredentialing. The ASP regulation, moreover, specifically links ASP terminations to fitness reports and performance. The Court of Appeals' observation, therefore, that "[t]he regularity of [Dr. Voge's] military records and the actions of her superiors in evaluating her performance as a doctor and officer is entirely unrelated to" the ASP termination decision, Pet. App. 13a, is an "appeal to unreality." *Sibbach v. Wilson & Co.*, 312 U.S. 1, 18 (1940) (Frankfurter, J., dissenting).

Because Congress centralized Tucker Act appeals in the Federal Circuit, 28 U.S.C. § 1295(a)(3) (Supp. IV 1986), there can never be a conflict among the circuits on the § 1491(a)(2) issue. As the Court of Appeals' misconstruction of that important provision is egregious and will affect a broad range of military and civilian litigants, plenary review is urgently needed.

Conclusion

If the armed services are to attract the highly qualified medical professionals they plainly need, those personnel must be assured that they will be treated fairly and in accordance with law. The petition for a writ of certiorari should be granted.

Respectfully submitted,

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July 1988

APPENDIX

APPENDIX A

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the
Federal Circuit

87-1307

VICTORIA M. VOGE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

FILED
JUN 9 1988

ORDER

A suggestion for rehearing in banc having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the suggestion for rehearing in banc is declined.

FOR THE COURT:

/s/ FRANCIS X. GINDHART
FRANCIS X. GINDHART, CLERK

6/9/88

Date
cc: Mr. Eugene R. Fidell
Mr. John S. Groat, DOJ

APPENDIX B

Note: This Order has not been prepared for publication in a printed volume because it does not add significantly to the body of law and is not of widespread legal interest. It is a public record. It is not citable as precedent.

United States Court of Appeals
for the
Federal Circuit

87-1307

VICTORIA M. VOGE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

FILED
MAY 26 1988
Before MARKEY, *Chief Judge,* RICH and MAYER, *Circuit Judges.*

ORDER

A petition for rehearing having been filed in this case,

UPON CONSIDERATION THEREOF, it is

ORDERED that the petition for rehearing be, and the same hereby is, denied.

The suggestion for rehearing in banc is under consideration.

FOR THE COURT:

/s/ FRANCIS X. GINDHART
FRANCIS X. GINDHART, CLERK

5/26/88

Date
cc: Mr. Eugene R. Fidell
Mr. John S. Groat, DOJ

APPENDIX C

United States Court of Appeals
for the
Federal Circuit

87-1307

VICTORIA M. VOGE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

DECIDED: April 19, 1988

Before MARKEY, *Chief Judge,* RICH and MAYER, *Circuit Judges.*
MAYER, *Circuit Judge.*

OPINION

This is an appeal from an order of the United States Claims Court, 11 Cl. Ct. 510 (1987), that awarded Commander Victoria M. Voge $30,000 in Additional Special Pay (ASP) but found no error in the preparation or content of Voge's military service records. We affirm the award of ASP, but vacate that portion of the order purporting to review Voge's service records.

Background

Voge, a medical doctor, was assigned to the Naval Regional Medical Center (NRMC) on Guam in 1981. Upon arrival, she was granted temporary clinical privileges as

a flight surgeon. Clinical privileges typically "reflect a health care provider's qualifications for staff membership and define . . . the procedures the practitioner may perform." Soon after her arrival, Voge's superiors began to express doubts about her medical competency. In 1982, her temporary clinical privileges were revoked and her application for permanent privileges was denied. Three adverse Officer Fitness Reports (OFR), covering periods between October 31, 1981 and March 31, 1983, referred to the revocation and ultimate denial of Voge's application for clinical privileges.

Also in 1982, Voge requested ASP, a form of remuneration that a medical officer normally receives after executing an agreement to remain on active duty for at least one year. *See* 37 U.S.C. § 302(c)(1). Because her clinical privileges had been revoked and she had received an adverse OFR for the period ending June 16, 1982, however, Voge's commanding officer recommended that her request for ASP for the year ending June 30, 1983 be denied. A Medical Corps Officer Review Board approved, and recommended that she also be denied ASP for two additional years. Accordingly, Voge was denied ASP from July 1, 1982 until June 30, 1985. In addition, she was passed over for promotion to captain in 1986.

Voge sought relief from the Board for the Correction of Naval Records (BCNR). *See* 10 U.S.C. § 1552. The Board recommended correction of portions of two adverse fitness reports but "concluded that the OFR's were otherwise not 'substantially erroneous or unfair' and that [Voge's] selection for promotion would have been 'unlikely' even with the corrections to her records." This was approved by the Secretary of the Navy. She then filed suit in the Claims Court seeking ASP from July 15, 1982 through June 15, 1985; review of evaluations made and decisions taken by military medical boards, committees and officers about her competence as a medical officer and correction of alleged errors in her OFR's and other records resulting from those

activities; and an order requiring the Secretary of the Navy to consider her for retroactive promotion to the rank of captain with back pay and other benefits.

Because of apparent procedural errors in the action taken to deny ASP, the government conceded that Voge was entitled to the full amount of ASP she sought. Specifically, the government conceded that for "the period July 15, 1982, through June 30, 1983 . . . a review board considered adverse information outside the scope of the information the board was to consider pursuant to the applicable regulation." Moreover, it acknowledged that for "the period July 1, 1983, through June 30, 1985, the cognizant official never made a discretionary determination to deny Voge ASP for that period, as is required by regulation."

Notwithstanding Voge's acknowledged entitlement to ASP, the government argued that the Claims Court had no jurisdiction to grant collateral relief by correcting Voge's military service records. In the government's view, the court could not "intrude into the [military's] discretionary matrix by examining the records that the review board considered."

The Claims Court considered the case on cross-motions for summary judgment. It ordered that the Navy pay Voge $30,000, an amount representing the ASP she had been denied and the Navy conceded she was due. It held, moreover, that it had jurisdiction to review Voge's service records pursuant to its review of the denial of ASP. However, the court found no error in the "preparation or content" of the OFR's that the BCNR refused to void, and said that Voge had no right to reconsideration of her nonselection for promotion to captain. Accordingly, the court denied any further relief.

On this appeal, Voge argues that the Claims Court has broad authority to review the ASP denial decision for both substantive and procedural error and erred in refusing to

order a variety of corrections to her personnel records, including the removal of adverse OFR's and the deletion of any reference to the revocation of her clinical privileges. She further asserts that the court erred in refusing to order that she be considered for retroactive promotion to captain. The government responds that the court had no jurisdiction to review the ASP denial decision beyond assuring the Navy had complied with its regulations in the process.

Discussion

The dispute centers on the scope of the Claims Court's ability to review a decision by the military to deny ASP to a medical officer. In particular, the question is whether the court may review the merits of an ASP denial or whether its authority extends only to procedural violations.

There is no dispute that the Claims Court had jurisdiction under the Tucker Act, 28 U.S.C. § 1491(a)(1), to entertain this suit because the ASP statute, 37 U.S.C. § 302, requires the payment of money to military medical officers. If a statute mandates payment by the government, the Tucker Act authorizes suit in the Claims Court. *See, e.g., Skinner v. United States*, 594 F.2d 824, 831 (Ct. Cl. 1979). The argument is over the extent of the jurisdiction, Voge arguing that it extends to both procedural and substantive review of the ASP denial, the government that it stops once the procedural aspects have been examined.

I.

Starting with the area of common agreement, we concur that the Claims Court may review the ASP denial process for compliance with established procedures. In pertinent part, 37 U.S.C. § 302(c)(2) says, "Under regulations prescribed by the Secretary of Defense . . ., the Secretary of the military department concerned may terminate at any time an officer's entitlement to [ASP]." It has long been

established that government officials must follow their own regulations, even if they were not compelled to have them at all, and certainly if directed to promulgate them by Congress, as in this case. *See Service v. Dulles*, 354 U.S. 363, 388 (1957). Here, the Secretary of the Navy prescribed procedural regulations to be followed when terminating ASP. *See* Cl. Ct. at 513. Because they apparently were violated, the Navy conceded that Voge was entitled to the full amount of ASP she had been denied. Absent this concession, the procedural regularity of the termination would have been fully reviewable in the Claims Court.

II.

The next question, the heart of this dispute, is whether the court may review the substantive merits of the decision to terminate ASP. Judicial deference must be "at its apogee" in matters pertaining to the military and national defense. *Rostker v. Goldberg*, 453 U.S. 57, 70 (1981); *see also Orloff v. Willoughby*, 345 U.S. 83, 93 (1953) ("judges are not given the task of running the Army"). Accordingly, "unless Congress specifically has provided otherwise, courts traditionally have been reluctant to intrude upon the authority of the Executive in military and national security affairs." *Department of Navy v. Egan*, 108 S. Ct. 818, 825 (1988).

In this case Congress statutorily entrusted the decision whether or not to terminate a medical officer's entitlement to ASP to the discretion of the military. Section 302 is clear and emphatic. It is even supported by the legislative history cited to us in an unnecessary effort to bolster the language of the statute. That section was "intend[ed] . . . to provide authority for termination of those special pays [including ASP] . . . similar to the authority provided by [37 U.S.C. § 313(b)]." H.R. Rep. No. 96-904, 96th Cong., 2d Sess. 9, *reprinted in* 1980 *U.S. Code Cong. & Admin. News* 1722, 1730. Under 37 U.S.C. § 313 (1976) (repealed by Pub. L. No. 96-513, Title IV, § 414(a), 94 Stat. 2906

(1980)), the payment of special pay was a matter left to the judgment of the Secretary who "could at any time terminate an officer's entitlement" to it. *See Adair v. United States*, 648 F.2d 1318, 1322 (Ct. Cl. 1981).

The government proposes that judicial review is therefore foreclosed because of an absence of jurisdiction, as indeed it was in *Adair* with variable incentive pay (VIP), a form of special compensation to medical personnel similar to ASP. But here we have a statute which all agree mandates payment of ASP until discretion is exercised to deny or terminate it. *Adair* addressed a statute that did not require payment until a discretionary decision was taken to pay the VIP; it was not a money-mandating statute. *See also Pardo v. United States*, 648 F.2d 1330, 1333 (Ct. Cl. 1981). What we face is a jurisprudential question: Can the Claims Court review the military's exercise of discretion when it has jurisdiction under the Tucker Act because of the mandatory monetary feature of the statute? We think not. It presents a nonjusticiable question.

A controversy is "justiciable" only if it is "one which the courts can finally and effectively decide, under tests and standards which they can soundly administer within their special field of competence." *Greene v. McElroy*, 254 F.2d 944, 953 (D.C. Cir. 1958), *rev'd on other grounds*, 360 U.S. 474 (1959); *see also Egan v. Dep't of Navy*, 802 F.2d 1563, 1581 (Fed. Cir. 1986) (Markey, C.J., dissenting), *rev'd*, 108 S. Ct. 818 (1988). Here there are no tests or standards for the court to apply in determining whether the decision to terminate ASP is correct. *Cf. American Fed'n of Gov't Employees, Local 2017 v. Brown*, 680 F.2d 722, 726 (11th Cir. 1982) (decision to contract out military services unreviewable where there were no guidelines against which the agency decision could be measured). Instead, Congress provided only that the determination to deny ASP may be made "at any time" by the Secretary.

"The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments . . .," and "[t]he ultimate responsibility for these decisions is appropriately vested in branches of the government which are periodically subject to electoral accountability." *Gilligan v. Morgan*, 413 U.S. 1, 10 (1973). Here the "ultimate responsibility" for making the determination whether to terminate ASP was explicitly vested by Congress in the military. Courts do not have the institutional competence to make the substantive determination that a particular medical officer is deserving of additional compensation. *Cf. Garbacz v. United States*, 656 F.2d 628, 636 (Ct. Cl. 1981) (Court of Claims had no authority to review the decision by the Administrator of NASA to give plaintiffs less than maximum salary increases since that decision was "wholly within [the] agency's discretion"). As the record shows, many military and medical factors went into the decision to deny Voge ASP, and it would be singularly inappropriate to second-guess the judgment of the military medical officers involved. *Cf. Maier v. Orr*, 754 F.2d 973, 984 (Fed. Cir. 1985).

This is like thousands of other routine personnel decisions regularly made by the services which are variously held nonjusticiable or beyond the competence or the jurisdiction of courts to wrestle with. *See, e.g., Gilligan*, 413 U.S. at 10 ("training, weaponry and orders" of the National Guard presents nonjusticiable issue); *Orloff*, 345 U.S. at 93 ("not within the power" of the courts to review determination to assign doctor to particular duties in the medical field); *Wilson v. Walker*, 777 F.2d 427, 429 (8th Cir. 1985) ("[t]raditional notions of judicial restraint and of the separation of powers" require courts to refuse to review military duty assignments); *Nieszner v. Mark*, 684 F.2d 562, 565 (8th Cir. 1982) (challenge to Air Force regulation imposing mandatory age restrictions for commissioned officers is nonjusticiable); *Perkins v. Rumsfeld*, 577

F.2d 366, 368 (6th Cir. 1978) (no jurisdiction over decision to transfer function from one military establishment to another); *Schulke v. United States*, 544 F.2d 453, 455 (10th Cir. 1976) (decision whether "to prefer charges under the Uniform Code of Military Justice" not subject to judicial review); *Turner v. Egan*, 358 F. Supp. 560, 563 (D. Alaska), *aff'd mem.*, 414 U.S. 1105 (1973) (no review of forced retirement of officers after specified number of years of military service).[1] Although the Claims Court had the authority to enter judgment for the amount of ASP that was concededly due because of procedural defects, that is as far as it could go.[2]

III.

Voge counters, however, that even if the Claims Court's review of the ASP termination decision is limited to procedural error the court nonetheless must correct any errors in her service records "collateral" to its award of

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[1] There is a significant difference between relatively minor and routine military personnel actions, like the denial of ASP, and the denial of all pay and allowances through allegedly unlawful discharge from military service because of statutory violations by the military departments. Nothing we say here is directed to the latter type claim which is extensively addressed in cases like *Sanders v. United States*, 594 F.2d 804, 814 (Ct. Cl. 1979), *Yee v. United States*, 512 F.2d 1383, 1388 (Ct. Cl. 1975), and *Clackum v. United States*, 296 F.2d 226, 229 (Ct. Cl. 1961).

[2] *Koster v. United States*, 685 F.2d 407, 412 (Ct. Cl. 1982), held that even where an action vacating an officer's temporary grade was discretionary it was subject to review for constitutional violations. Here, however, there was nothing in the revocation of Voge's clinical credentials, the composition of her service records, or the termination of ASP that rises to the level of a constitutional violation. We save for another day the difficult question of the court's power of review when a clear constitutional violation is established. *See Mindes v. Seamans*, 453 F.2d 197, 201 (5th Cir. 1971) (establishing four-factor test to apply to determine justiciability when a constitutional violation is claimed); *see also* Note, *Judicial Review of Constitutional Claims Against the Military*, 84 Colum. L. Rev. 387 (1984).

ASP. She relies on 28 U.S.C. § 1491(a), which in pertinent part provides:

> (1) The United States Claims Court shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort. . . .
>
> (2) To provide an entire remedy and to complete the relief afforded by the judgment, the court may, as an incident of and collateral to any such judgment, issue orders directing restoration to office or position, placement in appropriate duty or retirement status, and correction of applicable records. . . .

The argument is untenable for two reasons. First, section 1491(a) gives the Claims Court power to order the correction of military records only "incident of and collateral to" its award of a money judgment. *See Silbert v. United States*, 215 Ct. Cl. 913 (1977) (no power to correct records where claimant did not seek money judgment); *Austin v. United States*, 206 Ct. Cl. 719, 723 (1975) (no power "to grant affirmative non-monetary relief unless it is tied and subordinate to a monetary award"). Here, review of Voge's service records cannot be justified as "incident of and collateral to" the award of ASP because there was no reason to consider them in deciding whether in the ASP termination decision the military followed its own regulations. The regularity of her military records and the actions of her superiors in evaluating her performance as a doctor and officer is entirely unrelated to that issue. In essence, she suggests that the fortuity of the ASP decision is sufficient to open all of her records and the actions of boards and officers over a period of several

years to judicial scrutiny when they would be otherwise unreviewable in the Claims Court. *See Abruzzo v. United States,* 513 F.2d 608, 611 (Ct. Cl. 1975) (court's power to award claimant money judgment did not give it authority to grant equitable relief by directing "his appointment as an active-duty reserve officer"); *see also Brown v. United States,* 3 Cl. Ct. 31, 47 (1983) (where claim for money judgment was dismissed, Claims Court had no jurisdiction over plaintiff's claim for correction of records and reinstatement), *aff'd,* 741 F.2d 1374 (Fed. Cir. 1984); *cf. Carman v. United States,* 602 F.2d 946, 949 (Ct. Cl. 1979) (there must be a "sufficient nexus" between the money and the equitable claim for Claims Court to consider equitable claim).

The second reason for refusing to adopt Voge's contention is that it would allow the Claims Court to do indirectly what it is foreclosed from doing directly. By considering her service records for error in their "preparation or content," the Claims Court was passing on the merits of the decision to deny ASP which was first and last for the Navy.

We reach our conclusion notwithstanding that the naval correction board did fully review this case on the merits. But the board acts on behalf of the Secretary and its activities are not inconsistent with the contemplation of section 302 that discretion reside with the military. This does not, however, enlarge the justiciability of its decision in the Claims Court, just as board action on non-monetary claims does not enlarge the jurisdiction of that court to entertain them. *See, e.g., Reale v. United States,* 208 Ct. Cl. 1010, 1013 (1976) (court does not function as "a sort of super Correction Board"). We vacate that portion of the court's order purporting to review Voge's service records.

IV.

Lastly, we turn to Voge's demand that her nonselection for promotion to captain be set aside and that she be considered for a retroactive promotion. As we have noted, strong policy reasons compel courts "to allow the widest possible latitude to the armed services in their administration of personnel matters." *Sanders v. United States,* 594 F.2d 804, 813 (Ct. Cl. 1979); *see also Orloff,* 345 U.S. at 94. Accordingly, absent a statute or regulation entitling a service member to a promotion as a matter of law, the Claims Court has no authority to entertain this claim. *Ewanus v. United States,* 225 Ct. Cl. 598 (1980); *Curry v. United States,* 609 F.2d 980, 983 (Ct. Cl. 1979). This demand was properly refused.

Conclusion

The Claims Court's judgment in favor of Voge for $30,000 in ASP is affirmed, but that portion of the order purporting to review her military service records is vacated.

AFFIRMED IN PART AND VACATED IN PART

APPENDIX D

United States Court of Appeals
for the
Federal Circuit

87-1307

VICTORIA M. VOGE,
Plaintiff-Appellant,

v.

UNITED STATES,
Defendant-Appellee.

Judgment

ON APPEAL from the United States Claims Court
in CASE NO(S). 244-86 C
This CAUSE having been heard and considered, it is ORDERED and ADJUDGED:

AFFIRMED IN PART AND VACATED IN PART.

ENTERED BY ORDER OF THE COURT
Francis X. Gindhart
Francis X. Gindhart, Clerk

DATED APR 19 1988

ISSUED AS A MANDATE:
June 9, 1988
Costs: Against; Appellant
Printing.....$252.32
Total.....$252.32

APPENDIX E

In the United States Claims Court

No. 244-86C

VICTORIA M. VOGE,

Plaintiff,

v.

THE UNITED STATES,

Defendant,

(Filed February 19, 1987)

ORDER

Plaintiff moved for reconsideration of the order entered on January 16, 1987, and defendant responded as directed by the court.

Defendant does not address all of the points made by plaintiff; and, in fact, defendant sustains the result reached by the court based on grounds that were not relied upon in the January 16 order, specifically, the harmless error doctrine. The court did not reach that ground because it was of the view that the decredentializing process, while its result may have been one of the reasons why Additional Special Pay ("ASP") was denied to plaintiff, properly was not inquired into in a review of the discretionary decision to deny ASP.

Plaintiff's reconsideration motion addresses one subject that warrants clarification, although not modification of the court's order. The court stated at page 9 of its order that "[p]laintiff may have been the victim of a cabal. . . ." From this plaintiff argues 1) that she was the victim of an injustice that should have been addressed by the Board for Correction of Military Records (the "BCMR") and this

court and 2) that the BCMR and the court failed to examine the impact that the conspiratorial scheme had on the accuracy of the ratings plaintiff received or the legality of the actions taken against her.

Before issuing its order, the court reviewed plaintiff's administrative record in its entirety and found no basis for an injustice against plaintiff or the existence of any conspiratorial scheme. The record revealed that one of plaintiff's subordinates may not have liked her and reported on her medical performance to plaintiff's commanding officer, who, in turn, made his own investigation and authorized the subordinate and other individuals to report on plaintiff's performance so that he could evaluate it. Out of an abundance of caution, the court indicated that these circumstances may have constituted a cabal. However, the fact is that those instances that were reported to the commanding officer and for which plaintiff's medical judgment ultimately was faulted were matters within the commanding officer's particular medical competence to evaluate, as well as that of the other medical officers involved in the decredentializing process. Plaintiff's rebuttals in her record do not show that the medical judgments that precipitated her being decredentialized and that also were reported in her officer fitness reports were unfair or invalid. Accepting plaintiff's argument would mean that a physician could not be faulted for deficient performance because one of the people reporting incidents concerning his performance did not like him. The court is satisfied, based on the administrative record, that any personal animosity against plaintiff did not precipitate the incidents reported, did not taint the reports, and did not play a role in evaluating the incidents.

Accordingly, based on the foregoing,

IT IS ORDERED, as follows:

Plaintiff's motion for reconsideration is denied.

/s/ CHRISTINE C. NETTESHEIM
Christine Cook Nettesheim
Judge

APPENDIX F

United States Claims Court

No. 244-86 C

VICTORIA M. VOGE
vs.
THE UNITED STATES

At the Claims Court held in the City of Washington, on the 20th day of January, A.D. 1987, judgment was ordered to be entered as follows:

> that plaintiff recover of and from the United States additional service pay in the sum of $30,000, with $6,000 to be withheld from said amount for federal income tax purposes; and that the complaint is dismissed in all other respects. Costs to plaintiff.

A true copy of record.

In testimony whereof I have hereunto set my hand and affixed the seal of said Court at Washington, this 20th day of January, A.D. 1987

APPENDIX G

United States Claims Court
Jan. 16, 1987.

No. 244-86C.

Victoria M. VOGE,

Plaintiff,

v.

The UNITED STATES,

Defendant.

ORDER

NETTESHEIM, Judge.

This case is before the court after argument on defendant's motion for partial summary judgment and plaintiff's cross-motion for summary judgment. Three issues have been raised: 1) whether this court can review the decision to terminate additional special pay ("ASP") to which a servicemember is entitled absent its termination; 2) whether officer fitness reports ("OFR's") need only be fair and legal when they are used in connection with promotion determinations and not ASP determinations; and 3) whether a court's review of these OFR's includes examining the underlying procedures for revoking temporary medical privileges after the revocation has been reported in an OFR.

FACTS

Plaintiff Comdr. Victoria M. Voge ("plaintiff") at present and for the period of time in suit has served in the United States Navy. Her complaint seeks ASP from July 15, 1982 through June 15, 1985, and an order purging

and correcting her records and requiring that the Secretary of the Navy consider her for retroactive promotion to the rank of captain by special selection board with all appropriate backpay, allowances, and other benefits. Defendant's motion for partial summary judgment asserts that jurisdiction is lacking to consider plaintiff's claims other than entitlement to ASP for the period July 15, 1982, to June 30, 1985, which defendant concedes in the amount of $30,000.

The parties agree that there is no dispute with respect to the following facts.[1] Plaintiff is a medical officer, who served at Naval Regional Medical Center ("NRMC") Guam, from October 31, 1981, through March 31, 1983. When she arrived in Guam, plaintiff received temporary medical privileges as a flight surgeon which, although once extended, ultimately were revoked by the NRMC commanding officer on July 15, 1982, following a June 17, 1982 recommendation by the NRMC Guam Credentials Review Committee. The procedures for both extending and revoking her privileges were unorthodox. The instruction allowing for extension of temporary medical privileges beyond 90 days had been superseded when they were extended for an additional 90 days. The instruction applicable at the time did not allow for extensions. The applicable instruction also did not contemplate that the Credentials Review Committee meet in plaintiff's absence to consider revocation, as was done on May 27, 1982, before the formal meeting on June 17. Moreover, two individuals present at the May 27 meeting, the Director of Clinical Services (who was also the Chairman of the Credentials Review Committee) and the Chief of Internal Medicine, were involved in the incidents leading to the extension of privileges. Although they did not participate in the proceeding, they

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[1] The facts have been tailored to limit discussion of the matters that plaintiff sought to protect from disclosure by sealing the record. *See* order entered July 16, 1986.

stayed in the room during the formal June 17, 1982 meeting that culminated in the recommendation to revoke.

Three adverse OFR's (October 31, 1981-June 16, 1982; June 17, 1982-August 31, 1982; September 1, 1982-March 31, 1983) referred to the extension of plaintiff's temporary medical privileges, the preliminary report by the Credentials Review Committee that revocation of plaintiff's temporary medical privileges was being considered, the decredentializing itself, and the other consequences that followed revocation.[2]

ASP is conditioned on the execution of an agreement to remain on active duty for at least one year, 37 U.S.C. § 302(c)(1) (1982), and plaintiff submitted such an agreement. When plaintiff requested ASP for the year July 1, 1982, to June 30, 1983, her commanding officer on August 26, 1982, recommended to the Chief, Bureau of Medicine and Surgery, that plaintiff's request be denied because her temporary medical privileges had been revoked and because she had received an adverse OFR for the period ending June 16, 1982. Thereafter, on August 8, 1983, a Special Pay for Medical Corps Officer Review Board approved the commanding officer's recommendation that plaintiff be denied ASP for the one-year period. The board further recommended not to allow ASP for an additional two years. On August 12, 1983, the Director, Naval Medicine, approved the board's recommendations, thereby foreclosing plaintiff from ASP from July 1, 1982, to June 30, 1985. Plaintiff had filed complaints pursuant to 10 U.S.C. § 938 (1982), on August 10, 1982, and May 5, 1983, by which she sought review of certain actions taken by her

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[2] *See supra* note 1. Failure to discuss the medical and educational consequences to plaintiff of the decredentializing procedure does not imply that they have been overlooked.

commanding officer.[3] She was not selected for promotion to the rank of captain by the 1986 promotion board.

Before filing suit, plaintiff applied to the Board for the Correction of Naval Records (the "BCNR") requesting expungment of any reference in her records to the NRMC Guam Credentials Review Committee proceedings, comments by her superiors regarding the proceedings, and certain medical reports; correction of her records to show that she was granted medical privileges; removal of the first OFR and expungment of references from the later two OFR's to the revocation process; ASP for the three-year period; and consideration by a special promotion board. On February 7, 1986, the BCNR found an injustice warranting: (1) deletion from the October 31, 1981-June 16, 1982 OFR of language referring to prospective action, *i.e.*, the preliminary report of the Credentials Review Committee to the effect that revocation was recommended; the scheduling of plaintiff's formal appearance on June 17, 1982; and subjective remarks about the impact of the forthcoming June 17 meeting. The BCNR also ordered removal of the June 17, 1982-August 31, 1982 OFR, which, despite its being adverse, had not been shown to plaintiff before it was issued. The BCNR concluded that the OFR's were otherwise not "substantially erroneous or unfair" and that her selection for promotion would have been "unlikely" even with the corrections to her records. Except as noted, relief was otherwise denied.

DISCUSSION

Jurisdiction to review OFR's considered in terminating ASP

ASP is awarded pursuant to 37 U.S.C. § 302, which provides, in pertinent part.

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[3] The BCNR did not review plaintiff's complaints under 10 U.S.C. § 938, so the court cannot consider them. *See* Plf's Br. filed Dec. 1, 1986, at 15.

> (a)(1) An officer who is an officer of the Medical Corps of the Army or the Navy or an officer of the Air Force designated as a medical officer and who is on active duty under a call or order to active duty for a period of not less than one year is entitled to special pay in accordance with this subsection.
>
> . . . .
>
> (c)(1) An officer may not be paid additional special pay under subsection (a)(4) of this section or incentive special pay under subsection (b) of this section for any twelve-month period unless the officer first executes a written agreement under which the officer agrees to remain on active duty for a period of not less than one year beginning on the date the officer accepts the award of such special pay.

Once established, entitlement to ASP can be terminated pursuant to 37 U.S.C. § 302(c)(2), which provides in full:

> (2) Under regulations prescribed by the Secretary of Defense under section 303a(a) of this title, the Secretary of the military department concerned may terminate at any time an officer's entitlement to the special pay authorized by subsection (a)(4) or (b)(1) of this section. If such entitlement is terminated, the officer concerned is entitled to be paid such special pay only for the part of the period of active duty that he served, and he may be required to refund any amount in excess of that entitlement.

Defendant has conceded plaintiff's entitlement to ASP for a longer period than prayed for in her complaint. Def's Br. filed Oct. 23, 1986, at 3 & n.4. Plaintiff's entitlement to special pay was not terminated pursuant to 37 U.S.C. § 302(c)(2), requiring that the Secretary of the Navy terminate an officer's entitlement to ASP consistent with regulations prescribed by the Secretary of Defense. Defendant states that it has "failed to establish that proper

procedures were followed to terminate Commander Voge's entitlement to ASP. . . ." Def's Br. filed Oct. 23, 1986, at 3 (footnote omitted). Specifically, defendant suggests the particular failing was that the review board considered information beyond that prescribed in SECNAVINST 7220.75B ¶ 7b (Sept. 23, 1983), which confines review of the officer's performance to the OFR's issued as of the date of the agreement entitling the officer to ASP; supporting documents; the commanding officer's letter; and the officer's rebuttal, if any. The offending information apparently consisted of a microfiche of plaintiff's entire record, including an OFR issued subsequent to the date on which she became entitled to ASP. Defendant contends, however, that this court can do no more than enter judgment for the amount of ASP it has conceded based upon the procedural error, because the decision to terminate, assuming the proper procedures are followed, is purely discretionary. Plaintiff argues vigorously that collateral to entering the money judgment defendant would allow, 28 U.S.C. § 1491(a)(2) (1982), empowers this court to grant the incidental relief she seeks by way of correcting her records and ordering that she be considered for promotion.

In *German v. United States*, 225 Ct. Cl. 1, 633 F.2d 1369 (1980), the United States Court of Claims took jurisdiction over a claim for termination of variable incentive pay ("VIP") after plaintiff had qualified to receive it. The court examined the termination process, holding that the Navy improperly considered deterioration in the officer's performance before he signed the VIP agreement. In doing so, the court construed the language of the regulation governing the Secretary of Defense's authority to terminate " 'upon a determination that the officer's performance has deteriorated to a level at which no premium should be placed upon his continued service.' " 225 Ct. Cl. at 5, 633 F.2d at 1371; *cf. Adair v. United States*, 227 Ct. Cl. 345, 648 F.2d 1318 (1981) (statute authorizing VIP for public health officers did not provide for a right to

pay; statute construed as discretionary mechanism), *followed in Pardo v. United States*, 227 Ct. Cl. 377, 648 F.2d 1330 (1981) (no monetary entitlement to VIP in action brought by Army Medical Corps officer). Defendant asserts that VIP and ASP are different in that terminating ASP is purely discretionary, as shown by the legislative history to the predecessor statute providing for ASP. Yet the decision to terminate VIP is also discretionary. The Court of Claims in *German* did not review whether the officer's performance had deteriorated, but ruled only that records the board reviewed should not have been considered.

Defendant argues that the court would go beyond *German* and intrude into the discretionary matrix by examining the records that the review board considered, specifically the OFR's, to determine their legality. However, the review defendant seeks to inhibit is the same review for procedural error made in *German* and in cases where allegedly defective records are considered by promotion boards. Unlike cases involving discharge following denial of promotion, defendant contends that the record considered in an ASP termination proceeding need not present plaintiff's service career on a fair and equitable basis. *Sanders v. United States*, 219 Ct. Cl. 285, 302, 594 F.2d 804, 814 (1979). According to defendant, this fairness guarantee, and the statutes from which the right is derived, 10 U.S.C. §§ 615, 617 (1982 & Supp. 1986), apply only to the officer's record when before a promotion board. The result of defendant's argument is that plaintiff could not challenge the legality of her record until discharged. Thus, according to defendant, plaintiff could be denied ASP based on allegedly illegal information in her OFR's as long as the proper termination procedures were followed, but she could not be denied pay following a discharge for nonpromotion based on the same information in her OFR's.

This court can order an illegal OFR expunged, as long as the cause of action is based on a statute mandating

the payment of money. *Sanders,* 219 Ct. Cl. at 314, 594 F.2d at 820; *see Testan v. United States,* 424 U.S. 392 (1976); *United States v. King,* 395 U.S. 1, 96 S.Ct. 948, 47 L.Ed.2d 114 (1969); *cf. United States v. Wickersham,* 201 U.S. 390, 26 S.Ct. 469, 50 L.Ed. 798 (1906) (compensation to which plaintiff entitled by law as federal employee due during wrongful suspension gives right of action). By exercising its power, the court does not make promotion determinations. The United States Claims Court, like its predecessor, has no authority to order a promotion absent a statute or regulation mandating promotion or entitling plaintiff to promotion as a matter of law. *E.g., Schuenemeyer v. United States,* 4 Cl. Ct. 649, 652 (1984) (citing cases); *Alford v. United States,* 3 Cl. Ct. 229, 231 (1983) (citing cases). The Supreme Court established in *Orloff v. Willoughby,* 345 U.S. 83, 93-94, 73 S.Ct. 534, 539-40, 97 L.Ed. 842 (1953), that a court cannot order an officer of the military to be commissioned or to define duties. Therefore, it is concluded that the court can review OFR's in an action challenging the termination of ASP, which derives from a money-mandating statute.

Defendant's argument also must be rejected as impractical. If a servicemember is entitled to a legally constituted record for promotion, a *fortiori* the record should be corrected as soon as possible. Defendant does not hesitate to trot out the affirmative defense of laches in military pay cases on the ground that the military is prejudiced by delay in contesting OFR's. Plaintiff here only takes occasion to ask that her record be in compliance with the law. If an allegedly illegal record can be used for other purposes, such as an ASP termination proceeding, and a plaintiff is legitimately in court on the basis of a money-mandating statute, so much the better that the contested OFR's be reviewed in a more timely manner.

Review of the procedures in the decredentializing action.

A decision of the BCNR is on review. Plaintiff must show that the decision was arbitrary, capricious, unsupported by substantial evidence, or contrary to law. *E.g., Alberico v. United States,* 783 F.2d 1024, 1029 (Fed.Cir.1986) (citing cases). The BCNR concluded, *inter alia,* that some of the procedures antecedent to decredentializing were not defective and the ones that were contrary to applicable procedures did not harm her. Plaintiff contends that the procedural errors—the irregularities noted by the BCNR and others the board refused to find in error—infect the revocation of her temporary medical privileges and everything that flowed from it, including references to the underlying events in her OFR's, which contributed to her later failure to be selected for promotion.

The court declines to disturb the BCNR's decision because the procedures whereby plaintiff's temporary medical privileges were revoked, even if procedurely defective, do not amount to error in the preparation or composition of her record. The type of error in plaintiff's OFR's that is cognizable and can be remedied by judicial review is error in their preparation or composition. In *Hary v. United States,* 228 Ct. Cl. 10. 17-18, 618 F.2d 704, 708 (1980), involving an officer effectiveness report ("OER") which is the equivalent of an OFR, the Court of Claims stated:

> [P]laintiffs must do more, to invoke court intervention, than merely allege or prove that an OER seems inaccurate, incomplete, or subjective in some sense. The showing is not enough where an allegation, even if proved, fails to establish the presence of "factors adversely affecting the ratings which had no business being in the rating process," *id.,* or where there is no clear violation of a specific objective requirement of statute or regulation, or where there is no misstatement of a significant hard fact. Nor is it enough to impel us to act that the rater may now say that he scored the claimant too low. In *Tanaka v. United*

States, 210 Ct. Cl. 712 [538 F.2d 348] (1976), *cert. denied,* 430 U.S. 955 [97 S.Ct. 1599, 51 L.Ed.2d 804] (1977), we held that rater's statement that his opinion had changed and that he would now rate plaintiff higher, absent any misstatements or fact in the OER, did not tender a triable issue on the accuracy of an OER. In *Savio v. United States,* 213 Ct. Cl. 737 [553 F.2d 105] (1977), the plaintiff supported a challenge to the accuracy of an OER with a statement by the rater that the rating was not consistent with the rater's high regard for the plaintiff, blaming this on his slight personal attention to the plaintiff's performance of duties, words of caution he had received from his superiors on inflating numerical ratings in OERs, and his failure to include pertinent information in the report. Again, there were no allegations of misstatements of hard fact in the original rating, and we refused to order the removal of the challenged OER. *See also Borgford v. United States, supra* [221 Ct. Cl. 920, 618 F.2d 124]. In *Stewart v. United States,* 222 Ct. Cl. 42, 611 F.2d 1356 (1979), we held that plaintiff's allegation that OERs were inaccurate because his rater's intentionally downgraded his ratings in order that he would show job progression was an insufficient ground for our voiding the OERs. *Id.* at 45, 611 F.2d at 1358. *See also Reid v. United States, supra* [221 Ct. Cl. 864, 618 F.2d 123]; *Wilson v. United States, supra* [221 Ct. Cl. 852, 618 F.2d 123].

Henderson v. United States, 175 Ct. Cl. 690 (1966) (per curiam), *cert. denied,* 386 U.S. 1016, 87 S.Ct. 1373, 18 L.Ed.2d 455 (1967), does not require a different result. There the Court of Claims held that the procedures for judging a pilot unqualified for further training were defective. The case is distinguishable because the decision reviewed precipitated his discharge, *i.e.,* absent qualification, he could not longer serve in the military. *Henderson* did not deal with OFR's.

Plaintiff asks for a two-tiered analysis: judicial review of how the OFR's were prepared and judicial review of the legality of the procedures undertaken in the decredentializing process.[4] This the court will not do, for the door thereby would be opened to judicial review of every procedure whereby a servicemember is deemed fit or qualified for some matter that is reported in an OFR. Unquestionably, the decision to revoke temporary medical privileges is not judicially reviewable in this court because it is not based on a money-mandating statute. Even if the decision to terminate ASP was based on the results of the decredentializing procedure, the court will not overturn the decision to terminate ASP unless 1) the procedures for making the decision to terminate ASP were themselves defective, which defendant has admitted, or unless 2) the OFR's considered in the ASP determination were defective, and the BCNR ordered one OFR removed for improper preparation. The implications of expanding the court's inquiry to reviewing military procedures that underlie all aspects of a servicemember's career reported in OFR's are awesome. Prudence dictates that judicial review be limited to the preparation and content of the OFR's themselves. In this case there was a violation of procedures in terminating ASP, but no violation of procedures in preparing the two OFR's that the BCNR refused to void.

Assuming that this court could find an OFR defective insofar as it referred to a defective decredentializing procedure, the OFR for October 31, 1981-June 16, 1982, would

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[4] After the BCNR removed from the first OFR (October 31, 1981-June 16, 1982) references to the decredentializing procedures and removed the second OFR (June 17, 1982-August 31, 1982) from plaintiff's record, the only mention to the revocation are a reference to the extension of her temporary medical privileges in the first OFR and comments in the third (September 1, 1982-March 31, 1983) on education required after the revocation. The BCNR properly may remove from OFR's whatever it deems appropriate. The court is constrained not to go as far.

remain substantially as the BCNR left it.[5] Plaintiff assumes that, because all comments in her OFR's relating to the decredentializing procedure could be removed if the court found the decredentializing procedure materially defective, all related negative comments would be removed and that her grades would change. This is not so. The events precipitating revocation of plaintiff's temporary medical privileges were the same events that plaintiff's commanding officer commented on in this OFR as indicating deficient performance. Consequently, even if the court were to find that the procedures for revoking plaintiff's temporary medical privileges were error, and not harmless error, and ordered the remaining references to plaintiff's temporary medical privileges in this OFR purged, the separate, but parallel, narrative comments and grades relating to the same conduct would remain. The material that the BCNR did not expunge from the October 31, 1981-June 16, 1982 OFR consists, principally of opinions of her superior, who was also a medical officer, concerning plaintiff's medical judgment. The events forming the complaint in this case were instances in which her medical judgment was questioned. Plaintiff may have been the victim of a cabal. Certainly her first commanding officer in Guam can be criticized for allowing individuals to complain to him out of the chain of command. The commanding officer nonetheless could, and did, make negative comments based on his observation of plaintiff.

The other OFR that the BCNR declined to remove (September 1, 1982-March 3, 1983) contains fairly neutral comments on plaintiff's performance and references to the events that followed revocation of her temporary medical privileges. Again, even if the latter comments were to be excised, the former are proper, within the discretion of her commanding officer to make, and would remain.

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[5] *See supra* note 4.

The problem with plaintiff's case is that it turns on judgments by doctors of plaintiff's medical ability. The administrative record contains numerous rebuttals by plaintiff to comments that her professional skills or judgment were found wanting. The BCNR was justified fully in deferring to the judgments of plaintiff's superiors on matters of medical judgment, especially since her rebuttals are themselves opinions as to why her skills or judgment were not flawed in each instance—matters on which superiors and their subordinates often vary. The court will not second guess the medical judgments of plaintiff's superiors. *See Braddock v. United States,* 9 Cl. Ct. 463, 474 (1986). The BCNR's decision was not arbitrary, capricious, or unreasonable based on the record before the BCNR and this court.

CONCLUSION

Based on the foregoing, defendant's motion for partial summary judgment is granted and plaintiff's cross-motion for summary judgment is denied, except insofar as plaintiff is entitled to ASP. Accordingly,

IT IS ORDERED, as follows:

1. The Clerk of the Court shall enter judgment for plaintiff in the amount of $30,000, with instructions to withhold $6,000 for federal income tax purposes. The complaint is to be dismissed in all other respects.

2. The protective order shall be lifted 5 days after expiration of the time for appeal unless an appeal is filed in which case the protective order shall remain in effect until further order of the court.

No. 88-81 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

VICTORIA M. VOGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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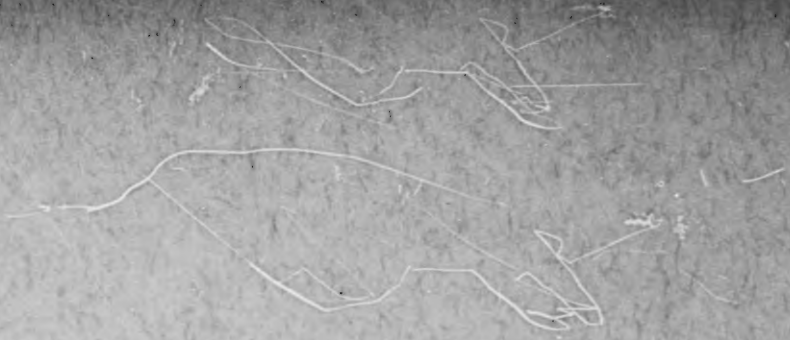

QUESTION PRESENTED

Whether the Claims Court lacked jurisdiction to review petitioner's military service records where there was no monetary claim at issue whose resolution depended upon a review of those records.

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In the Supreme Court of the United States

OCTOBER TERM, 1988

No. 88-81

VICTORIA M. VOGE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FEDERAL CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the Claims Court (Pet. App. 21a-33a) is reported at 11 Cl.Ct. 510. The opinion of the court of appeals (Pet. App. 5a-15a) is reported at 844 F.2d 776.

JURISDICTION

The judgment of the court of appeals (Pet. App. 16a) was entered on April 19, 1988. A petition for rehearing was denied on May 26, 1988 (Pet. App. 3a-4a). The petition for a writ of certiorari was filed on July 14, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is now serving on active duty as a commander in the Medical Corps, United States Navy. In

1981, petitioner was assigned to the Naval Regional Medical Center on Guam. Upon arrival, she was granted temporary clinical privileges as a flight surgeon. Those temporary privileges were subsequently revoked, however, and her application for permanent clinical privileges was denied after doubts arose concerning her medical competence. The revocation and denial of petitioner's clinical privileges, as well as the underlying concerns as to her competence, were reflected in three adverse fitness reports covering periods between October 31, 1981, and March 31, 1983. Pet. App. 6a.

In 1982, petitioner sought additional special pay (ASP), an extra renumeration that a medical officer normally receives after executing an agreement to remain on active duty for at least one year. See 37 U.S.C. 302(c)(1). Based on the denial of clinical privileges and the adverse fitness reports, petitioner's commanding officer recommended that her request be denied for the period from July 1, 1982, until June 30, 1983. A review board approved that recommendation and further determined that petitioner should be denied ASP from July 1, 1983, until June 30, 1985, after she completed a course of retraining. In addition, petitioner was passed over for promotion to Captain in 1986. Pet. App. 6a.

Petitioner sought relief from the Board for the Correction of Naval Records (BCNR) pursuant to 10 U.S.C. 1552.[1] The Board recommended correction of portions of

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[1] Petitioner requested that her Naval records be corrected (1) to delete references to actions taken to revoke and deny her clinical credentials; (2) to reflect favorable action upon her request for permanent clinical credentials; (3) to delete all references to two psychiatric evaluations; (4) to remove adverse fitness reports; (5) to show that she was entitled to ASP; and (6) to order her considered by a special promotion board for promotion to Captain. Pet. App. 24a.

two adverse fitness reports but "concluded that the [reports] were otherwise not 'substantially erroneous or unfair' and that [petitioner's] selection for promotion would have been 'unlikely' even with the corrections to her records." Pet. App. 6a. Based on this recommendation, the Secretary of the Navy approved the deletion of specific references to pending administrative action in one of her fitness reports and removal of another report, but denied petitioner's other requests for relief (*ibid.*).

2. Petitioner then instituted this action in the Claims Court, seeking essentially the same relief that she had sought from the BCNR. Based upon procedural errors in the denial of petitioner's ASP,[2] the United States did not oppose the Claims Court's issuance of a judgment for three years' worth of retroactive ASP in the amount of $30,000 (Pet. App. 25a). The United States moved for dismissal of petitioner's remaining claims on the grounds that they were beyond the jurisdiction of the Claims Court.

The Claims Court granted judgment for petitioner in the amount of $30,000. The court further held that it had jurisdiction to review petitioner's service records pursuant

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[2] Specifically, the review board passing on petitioner's request for ASP considered information beyond that prescribed in Navy regulations, which confine review of the officer's performance to fitness reports issued as of the date of the agreement entitling the officer to ASP; supporting documents; a letter from the officer's commanding officer; and the officer's rebuttal, if any. In this instance, the review board apparently had a copy of petitioner's entire file, which included a fitness report subsequent to the date on which she became eligible for ASP. Pet. App. 26a. Furthermore, for the period from July 1, 1983, through June 30, 1985, petitioner's commanding officer never made an official recommendation that she should be denied ASP. That separate recommendation is required by Navy regulations, notwithstanding the review board's determination to deny petitioner ASP for that period. Pet. App. 7a.

to its review of the denial of ASP. After reviewing the administrative record, the court found no error in the "preparation or composition" of the fitness reports that the BCNR had refused to void and declined to "second guess" the judgments of petitioner's superiors, reflected in the fitness reports and the denial of clinical privileges, as to her medical and military competence. The court further held that petitioner had no right to reconsideration of her nonselection for promotion to Captain. The court accordingly denied any further relief. Pet. App. 26a-33a.

3. The court of appeals affirmed the Claims Court's judgment for ASP, but vacated that part of the Claims Court's decision that purported to review petitioner's military records. The court concluded that the substantive merits of the military's decision to deny petitioner ASP were not justiciable since "Congress statutorily entrusted [that decision] to the discretion of the military" and the courts may not second guess "routine personnel decisions regularly made by the military." Pet. App. 9a-11a. The court of appeals therefore concluded that the Claims Court had no jurisdiction, in the context of reviewing the procedures employed to deny ASP, to review the denial of clinical privileges and the adverse fitness reports upon which the military based its decision to deny petitioner ASP (*id.* at 8a-12a).

The court further held that the various record corrections sought by petitioner were not "an incident of [or] collateral to" (28 U.S.C. 1491(a)(2)) her monetary entitlement to ASP and hence were beyond the jurisdiction of the Claims Court. "The regularity of her military records and the actions of her superiors in evaluating her performance as a doctor and officer," the court concluded (Pet. App. 13a), are "entirely unrelated" to the question whether "in the ASP termination decision the military followed its own

regulations." Since petitioner sought no monetary relief based on the alleged errors in her military record, the court of appeals concluded that the Claims Court had no jurisdiction to conduct a general review of those records. In any event, the court stated (*id.* at 14a), the Claims Court cannot "do indirectly what it is foreclosed from doing directly. By considering her service records for error in their 'preparation or content,' " the court of appeals held (*ibid.*), "the Claims Court was passing on the merits of the decision to deny ASP which was first and last for the Navy."

ARGUMENT

The decision of the court of appeals is correct. It does not conflict with any decision of this Court or any other court of appeals. Accordingly, no further review is warranted.

The court of appeals correctly held that, in the course of reviewing the denial of ASP, the Claims Court could not review the discretionary assessments of petitioner's military and professional performance as reflected in her fitness reports and in the decision to deny her clinical privileges. Subsection 302(c)(2) of Title 37 provides that "[u]nder regulations prescribed by the Secretary of Defense * * *, the Secretary of the military department concerned may terminate at any time an officer's entitlement to [ASP]." Secretary of the Navy Instruction 7220.75A (Apr. 23, 1982) provides that the Surgeon General of the Navy may terminate ASP by approving the recommendation of a review board that the officer's "professional performance is inadequate to justify continuing payment of special pay" (Pet. 3). Neither the statute nor the implementing regulation provides a substantive standard governing the denial of ASP; the decision is left solely

to the discretion of the Navy. There is, therefore, " 'no meaningful standard against which [a reviewing court could] judge the agency's exercise of discretion.' " *Webster* v. *Doe*, No. 86-1294 (June 15, 1988), slip op. 6 (quoting *Heckler* v. *Chaney*, 470 U.S. 821, 830 (1985)).

The Navy consented to the entry of judgment for petitioner for ASP for the period from July 15, 1982, through June 30, 1985. Petitioner's entitlement to ASP for that period, however, rested exclusively upon the failure of officials to follow proper administrative procedures to terminate that entitlement. See *German* v. *United States*, 633 F.2d 1369 (Ct. Cl. 1980) (medical officer entitled to Variable Incentive Pay where determination to deny that pay was based upon consideration of improper matters). Although the Claims Court could properly review the decision to deny petitioner ASP for procedural irregularities, the Court lacked jurisdiction to review the substantive merits of that determination. The Claims Court, therefore, lacked any justification for reviewing petitioner's underlying military and professional records incident to its review of petitioner's claim for ASP.[3]

Courts have traditionally and properly been reluctant to intervene in any matter that "goes directly to the 'management' of the military [and] calls into question basic choices about the discipline, supervision, and control of a serviceman." *United States* v. *Shearer*, 473 U.S. 52, 58 (1985). The "complex, subtle, and professional decisions as to the composition, training, equipping, and control of a mili-

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[3] Petitioner does not claim that the denial of ASP—or the decision to deny clinical privileges—violated any substantive constitutional rights. Thus, the Court's recent decision in *Webster* v. *Doe, supra* (recognizing APA review for colorable constitutional claims even where decision is otherwise "committed to agency discretion by law" within the meaning of 5 U.S.C. 701(a)(2)), has no bearing on this case.

tary force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches." *Gilligan* v. *Morgan*, 413 U.S. 1, 10 (1973) (emphasis omitted). On such matters, it is not appropriate for a "civilian court to second-guess military decisions." *United States* v. *Shearer*, 473 U.S. at 58. Indeed, "it is difficult to conceive of an area of governmental activity in which the courts have less competence." *Gilligan* v. *Morgan*, 413 U.S. at 10.

In view of these principles, it would be plainly inappropriate for a court to use a discretionary judgment to deny ASP as a window through which to conduct a general review of a military officer's service record. In the military context, this Court has always looked for an express mandate before exercising its jurisdiction in a way that might interfere with the smooth functioning of the military. See, *e.g.*, *Feres* v. *United States*, 340 U.S. 135 (1950) (declining to apply Federal Tort Claims Act to suits by servicemen for service-related injuries); *Orloff* v. *Willoughby*, 345 U.S. 83 (1953) (declining to review propriety of duty assignment); *Burns* v. *Wilson*, 346 U.S. 137, 142, 144 (1953) (plurality opinion) (giving narrow interpretation to scope of federal habeas corpus relief available to servicemen); *Gilligan* v. *Morgan*, 413 U.S. at 10 (declining to assume jurisdiction over training, weaponry and orders of National Guard); *Schlesinger* v. *Councilman*, 420 U.S. 738, 757-758 (1975) (limiting ability of servicemen to obtain injunctive relief for alleged wrongs, including constitutional violations); *Chappell* v. *Wallace*, 462 U.S. 296 (1983) (refusing to permit military personnel to maintain suit to recover damages from a superior officer for alleged constitutional violations); *Department of the Navy* v. *Egan*, No. 86-1552 (Feb. 23, 1988) (declining to permit Merit Systems Protection Board, in the course of reviewing an adverse action suffered by a civilian employee of

the Navy, to review security clearance determinations made by the Navy). The court of appeals thus correctly concluded that, in the course of reviewing the denial of ASP for procedural propriety, the Claims Court was without jurisdiction to review the discretionary assessments of petitioner's military and professional performance as reflected in her fitness reports and in the decision to deny her clinical privileges.

In any event, even if the Claims Court would ordinarily have jurisdiction to review the substantive merits of a decision to deny ASP, there was no occasion for the Claims Court to reach that question in this case because of its resolution of the procedural issue. Following the Navy's confession of procedural error, petitioner received complete relief for her loss of ASP. There was, therefore, no occasion for the Claims Court even to reach the question of whether the denial of ASP was arbitrary and capricious and, hence, no occasion for the Claims Court to examine the denial of clinical privileges and the adverse fitness reports that led to the denial of ASP. Petitioner cannot be heard to complain that, although she received complete relief in the form of restoration of lost ASP, the courts below granted that relief without reaching the grounds she advanced.

Petitioner correctly notes (Pet. 19-20) that in *Chappell* v. *Wallace*, 462 U.S. at 303, this Court stated that BCNR decisions are generally subject to judicial review and can be set aside if they are arbitrary or capricious. Petitioner, however, did not bring suit in district court seeking review of the decision of the BNCR declining to make requested changes in her military records. Rather, petitioner sought a money judgment in the Claims Court for the loss of ASP, and the court of appeals properly concluded (Pet. App. 12a-14a) that a general review of her service records

was not "incident of and collateral to" that issue within the meaning of 28 U.S.C. 1491(a)(2).

In *United States* v. *Testan*, 424 U.S. 392, 404 (1976), this Court held that 28 U.S.C. 1491(a)(2) (permitting the Court of Claims to grant relief "incident of and collateral to" a money judgment) did not expand the jurisdiction of the Tucker Act to encompass claims not based upon some statute or regulation that mandates compensation. Petitioner's entitlement to ASP under 37 U.S.C. 302(c)(2) depended solely upon the procedural irregularities in the discretionary determination made to deny her ASP. The corrections she sought to her underlying military records were wholly unrelated to that question. Thus, the Claims Court lacked jurisdiction to entertain petitioner's requests for changes in her military record, notwithstanding the jurisdiction of the BCNR to entertain those requests. The court of appeals properly rejected (Pet. App. 14a) petitioner's contention that the Tucker Act jurisdiction of the Claims Court is coextensive with the BCNR's broad equitable jurisdiction to correct military records pursuant to 10 U.S.C. 1552.[4]

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[4] In any event, although BCNR decisions are generally reviewable, the mere fact that an otherwise nonjusticiable claim has first been passed on by the BCNR should not transform it into a justiciable claim. The restrictions on the justiciability of claims raised by servicemen noted above (pp. 7-8, *supra*) should apply whether the case is brought directly to federal court or indirectly on review of a BCNR decision. Thus, petitioner' attempt to challenge simply the correctness—as opposed to the constitutional validity (see n.3, *supra*)—of the denial of clinical privileges would fail, in our view, even in a suit brought in district court on review of the BCNR decision as an impermissible judicial challenge to the propriety of a duty assignment. See *Orloff* v. *Willoughby*, *supra*. Of course, that question is not presented here.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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No. 88-81

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

VICTORIA M. VOGE,

Petitioner,

v.

UNITED STATES,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

THE GOVERNMENT'S OPPOSITION (A) OVERLOOKS THE FACT THAT CONGRESS HAS EXPRESSLY RECOGNIZED THAT MILITARY DECREDENTIALING IS JUSTICIABLE, AND (B) MISTAKENLY URGES A DENIAL OF CERTIORARI WHERE, AT WORST, TRANSFER TO A DISTRICT COURT IS IN ORDER

The decision of the Court of Appeals rests on two basic propositions:

> a. that military personnel actions such as Dr. Voge's loss of hospital credentials and passover for promotion to Captain are non-justiciable; and

b. that these actions are not properly reviewed in the Claims Court in the context of a Tucker Act case for Additional Special Pay ("ASP"), even though that pay was denied on grounds that are inextricably intertwined with both the loss of credentials and the passover.

The Government's Opposition does justice to neither of these issues.

1. The Petition explains why actions such as those complained of by Dr. Voge are justiciable. Military passovers have long been understood to be subject to judicial review, as witness the cases this Court cited with approval in *Chappell v. Wallace,* 462 U.S. 296, 303 (1983).[1] Similarly, improper revocation of hospital privileges is today widely recognized as actionable in the civilian community. Nothing in the Opposition suggests that the same type of action against a physician suddenly becomes unfit for judicial scrutiny when the hospital happens to be run by the military. If anything, the detailed procedural regulations laid down in the Navy's *Fair Hearing Plan,* Pet. at 4-9, make judicial review of military decredentialing more appropriate than in civilian settings where hospital decisionmaking may be less structured.

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[1] Footnote 4 of the Opposition reflects an understanding of the amenability of correction board decisions to judicial review under the Administrative Procedure Act ("APA") which conflicts with *Chappell* and should not be permitted to enter the canon of military personnel law without examination. The extent to which a correction board decision that was channeled only by the "error" or "injustice" standards of 10 U.S.C. § 1552(a) (1982) is subject to APA review is not presented by this case, since here there were three *other* clearly adequate sources of "law to apply." Pet. at 21-22.

2. But there is no need to rest simply on logic, for Congress—in a statute to which the Government adverted in the Court of Appeals (but to which its Opposition makes no reference)—unmistakably revealed its understanding that decredentialing such as that suffered by this Navy doctor is subject to judicial review. Section 705(a) of the National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, 100 Stat. 3902, provides that medical quality assurance records of the Department of Defense may be disclosed, *inter alia*,

> [t]o an administrative or *judicial* proceeding commenced by a present or former Department of Defense health care provider concerning the termination, suspension, or limitation of clinical privileges of such health care provider. 10 U.S.C.A. § 1102(c)(1)(B) (West Supp. 1988) (emphasis added).

Whatever the proper rule may be with respect to other kinds of military personnel actions, therefore, Congress has expressly recognized that actions such as that taken against Dr. Voge's hospital privileges are a proper subject of judicial review. The interest vindicated by this provision is that of affording "[b]asic fairness" to "the affected practitioner." Woodruff, *The Confidentiality of Medical Quality Assurance Records*, Army Lawy. 5, 10 & n.53 (May 1987). The Government's assertion that the justiciability ruling below is correct cannot be reconciled with this statute.[2]

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[2] Section 1102 was passed after Dr. Voge's decredentialing, but is retroactive. Pub. L. No. 99-661, § 705(b), 100 Stat. 3904. Even if it were not retroactive, the legislation would still show

3. As to issue *b*, only a little needs to be added to what we stated in the Petition. As we explained, the Federal Circuit's myopic reading of the 1972 Tucker Act amendment would force litigants such as Dr. Voge to bifurcate their claims in precisely the manner Congress sought to avoid. We think that reading misconceives the Congressional purpose, and that the Court of Appeals had a duty under 28 U.S.C. § 1491(a)(2) (1982) to ensure that meaningful judicial review occurred on the merits of Dr. Voge's nonmonetary issues because they arose from the same common nucleus of operative fact as her ASP claim. The Court of Appeals never performed that review because it embraced a mistaken view of justiciability. The remedy, in order to effectuate the goal of the 1972 amendment, is to remand to the Federal Circuit.

4. On the other hand, if our reading of the 1972 amendment is incorrect, and the Claims Court should not have addressed the merits of the nonmonetary relief Dr. Voge sought along with her ASP,[3] then surely she is entitled to have the path cleared so she

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Congress's expectation that credentialing disputes involving military personnel are a proper subject of judicial review. Such a Congressional judgment, if not dispositive, *Muskrat v. United States*, 219 U.S. 346 (1911); *see* P. Bator, D. Meltzer, P. Mishkin & D. Shapiro, *Hart & Wechsler's The Federal Courts and the Federal System* 231-34 (3d ed. 1988), is certainly entitled to great deference, given Congress's responsibility to "raise and support Armies," "provide and maintain a Navy" and "make Rules for the Government and Regulation of the land and naval Forces." U.S. Const. art. I, § 8. *E.g., Rostker v. Goldberg*, 453 U.S. 57, 64-69 (1981).

[3] *See Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2178 (1988) (disapproving of Federal Circuit's commenting on merits of case over which it lacked jurisdiction).

may litigate the loss of credentials and passover in a district court. Since, as we have explained, these claims are justiciable, that is the proper alternative forum, and the judgment below should be vacated with instructions to transfer to the District Court for the District of Columbia. 28 U.S.C. § 1631 (1982). Absent such a disposition, an action in the district court would likely be barred by the judgment below.[4]

Conclusion

The proper interpretation of the 1972 Tucker Act amendment is an important matter as to which plenary briefing and argument are appropriate under the usual standards.[5] In any event, the correct disposition is not a denial of certiorari (as the Opposition suggests), but an order vacating with instructions to affirm the money judgment and transfer the remainder of the case. *E.g., Christianson v. Colt Industries Operating Corp., supra.*

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[4] Given the Government's failure to allay the concerns expressed in the Petition about the improper preclusive effect of the judgment (*see* Pet. at 17 n.3, 19), it is certain to resist district court litigation of the decredentialing and passover unless this Court takes corrective action. In addition, footnote 4 of the Opposition contends (incorrectly) that the decredentialing would be nonjusticiable in district court.

[5] The Opposition notes the absence of conflict among the Circuits, but fails to respond to our observation (Pet. at 28) that such conflicts are impossible under the Tucker Act since all Tucker Act appeals go to the Federal Circuit.

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